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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. A-992

ROBERT E. WILLIAMS,

Petitioner,

V.

THE STATE OF NEBRASKA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEBRASKA

THOMAS L. HAGEL
Temple University Law School
Philadelphia, Pennsylvania 19122
ATTORNEY FOR PETITIONER

RICHARD L. GOOS
Office of the Public Defender
555 South 10th Street
Lincoln, Nebraska 68508
OF COUNSEL

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C. McCormick, Evidence (2nd ed. 1972) § 190 34

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J. Wigmore, 1 Evidence (3rd ed. 1940) § 57 34

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THE STATE OF NEBRASKA,

Respondent.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEBRASKA

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Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Nebraska entered December 18, 1979, rehearing denied February 14, 1980.

CITATIONS TO OPINIONS BELOW

The opinions of the Nebraska Supreme Court are reported at 205 Neb. 56, 287 N.W.2d 18 (1979), and attached as "Appendix A." Attached as "Appendix B" is the Court's Order and Warrant setting Petitioner's execution for May 20, 1980, and overruling Petitioner's Motion for Rehearing. Finally, the Court's Order staying the issuance of mandate and execution of the sentence is attached as "Appendix C."

JURISDICTION

Jurisdiction of this Court is invoked under the provisions of 28 U.S.C. § 1257(3), petitioner having asserted below, and asserting herein, his deprivation of rights secured by the United States Constitution.

QUESTIONS PRESENTED

1. Whether the prosecution's conscious withholding of evidence favorable to the petitioner and potentially useful in his defense, in that said evidence would have tended to negate his guilt, mitigate the quality and nature of his acts and substantiate his defense

of insanity thereby violating his rights and privileges under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

2. Whether the prosecution's introduction, before the jury, of vast amounts of prejudicial, irrelevant and inflammatory testimony and gruesome color photographs violated petitioner's rights to a fair trial and due process of law as guaranteed under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

3. Whether the trial court's refusal to give petitioner's requested instructions concerning: (1) the potential consequences of a verdict of "not guilty by reason of insanity;" and (2) "intoxication" as a consideration in determining the presence or absence of the elements of "willfullness," "deliberation," "premeditation" and "malice" in the commission of the crimes charged violated petitioner's rights to a fair trial and due process of law as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

4. Whether petitioner's two consecutive sentences of death are constitutionally valid:

a) Whether said sentences are disproportionately severe, cruel, unusual and unconstitutional for one who, from the weight of the evidence, acted under extreme emotional instability and diminished mental capacity.

b) Whether the Nebraska death penalty statutes and procedures for review are so vague, overbroad and discretionary as to violate petitioner's rights to due process of law, the equal protection of the law and the protection from the imposition of cruel and unusual punishments as guaranteed by the Fifth, Eighth and Fourteenth Amendments to the United States Constitution.

c) Whether the review of said sentences by the Supreme Court of Nebraska was so procedurally discriminatory and superficial as to violate petitioner's rights to due process of law and the equal protection of the law as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution.

d) Whether the Nebraska capital sentencing procedures impermissibly and unconstitutionally shift the burden of coming forward and proving facts which precisely and specifically distinguish between those who may receive a sentence of life imprisonment and those who must receive a sentence of death.

e) Whether the Nebraska death penalty statutes deny the petitioner the right to a judgment of his peers as to the existence of mitigating circumstances and the appropriateness of the imposition of the death penalty, all in violation of his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case presents issues involving the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

2. This case also presents issues involving the following statutory provisions of Nebraska Law:

Neb. Rev. Stat. § 27-401 (Reissue 1975). Relevant evidence, defined. (Page 6).

Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Neb. Rev. Stat. § 27-403 (Reissue 1975). Exclusion of relevant evidence; reasons. (Page 6).

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Neb. Rev. Stat. § 27-404 (Reissue 1975). Character evidence; not admissible to prove conduct; exceptions; evidence of other crimes, wrongs, or acts. (Pages 6 & 7).

(1) Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except:

(a) Evidence of a pertinent trait of his character offered by an accused, or by the prosecution to rebut the same;

(b) Evidence of a pertinent trait of character of the victim of the crime offered by an accused or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor; or

(c) Evidence of the character of a witness as provided in sections 27-607 to 27-609.

(2) Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Neb. Rev. Stat. § 29-1912 (Reissue 1975). Discovery; defendant charged with a felony; request to inspect and make copies of evidence; granted, when. (Pages 509 & 510).

(1) When a defendant is charged with a felony, he may request the court, at any time after the filing of the indictment or information, to order the prosecuting attorney to permit the defendant to inspect and copy or photograph:

(a) The defendant's statement, if any. For purposes of this subdivision statement shall mean a written statement made by the defendant and signed or otherwise adopted or approved by him, or a stenographic, mechanical, electrical or other recording, or a transcription thereof which is a substantially verbatim recital of an oral statement made by the defendant to an agent of the prosecution, state, or political subdivision thereof, and recorded contemporaneously with the making of such oral statement;

(b) The defendant's prior criminal record, if any;

(c) The defendant's recorded testimony before a grand jury;

(d) The names and addresses of witnesses on whose evidence the charge is based;

(e) The results and reports of physical or mental examinations, and of scientific tests, or experiments made in connection with the particular case, or copies thereof; and

(f) Documents, papers, books, accounts, letters, photographs, objects, or other tangible things of whatsoever kind or nature which could be used as evidence by the state.

(2) The court may issue such an order pursuant to the provisions of this section. In the exercise of its judicial discretion the court shall consider among other things whether:

(a) The request is material to the preparation of the defense;

(b) The request is not made primarily for the purpose of harassing the prosecution or its witnesses;

(c) The request, if granted, would not unreasonably delay the trial of the offense and an earlier request by the defendant could not have reasonably been made;

(d) There is no substantial likelihood that the request, if granted, would preclude a just determination of the issues at the trial of the offense; or

(e) The request, if granted, would not result in the possibility of bodily harm to, or coercion of, witnesses.

(3) Whenever the court refuses to grant an order pursuant to the provisions of this section, it shall render its findings in writing together with the facts upon which the findings are based.

(4) Whenever the prosecuting attorney believes that the granting of an order under the provisions of this section will result in the possibility of bodily harm to witnesses or that witnesses will be coerced, the court may permit him to make such a showing in the form of a written statement to be inspected by the court alone. The statement shall be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal by the defendant.

Neb. Rev. Stat. § 29-2203 (1978 Cum. Supp.). Defense of insanity; how pleaded; acquittal; commitment to hospital for mentally ill; when required. (Pages 370 & 371).

Any person prosecuted for an offense may plead that he is not guilty by reason of insanity or mental derangement at the time of the offense. No evidence offered by the defendant for the purpose of establishing his insanity or mental derangement shall be admitted in the trial of the case unless notice thereof shall have been given by the defendant as provided in this section.

At the time of defendant's arraignment, or not later than ten days before trial, defendant shall notify the county attorney of his intention to rely upon the defense of insanity or mental derangement as one of his defenses and file such notice. Upon the filing of the notice the court, on motion of the state and good cause shown, may cause the defendant to be examined by one or more disinterested, qualified experts, not exceeding three, appointed by the court,

at a time and place designated in the order, to inquiry into the sanity or insanity of the defendant at the time of the commission of the alleged offense or offenses. The presence of counsel at the examination shall be within the discretion of the court. The results of such examinations shall be filed with the court and copies given to the state and to the defendant. In the interest of justice and good cause shown the court may waive the requirements provided in this section.

When the defense is insanity of the defendant, the jury must be instructed, if it acquits him on that ground, to state the fact in its verdict. If the defendant is found not guilty by reason of insanity, the court shall forthwith (1) commit defendant to the care and custody of the Director of Medical Services for a period not to exceed thirty days, and (2) certify the verdict to the mental health board of the county and order that board to determine whether the person so acquitted is a mentally ill dangerous person and a fit subject for custody and treatment in a hospital. The certificate and order shall be considered by the mental health board as a petition for admission as provided in section 83-1025.

Neb. Rev. Stat. § 29-2308 (Reissue 1975). Writ of error; reduction of sentence; conditions; harmless error. (Pages 574 & 575).

In all criminal cases that now are, or may hereafter be pending in the Supreme Court on error, the court may reduce the sentence rendered by the district court against the accused, when in its opinion the sentence is excessive, and it shall be the duty of the Supreme Court to render such sentence against the accused as in its opinion may be warranted by the evidence. No judgment shall be set aside, or new trial granted, or judgment rendered in any criminal case, on the grounds of misdirection of the jury or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, if the Supreme Court, after an examination of the entire cause, shall consider that no substantial miscarri ge of justice has actually occurred.

(a) HOMICIDE

Neb. Rev. Stat. § 28-401 (Reissue 1975). Murder in the first degree; defined; penalty. (Page 48).

Whoever shall purposely and of deliberate and premeditated malice or in the perpetration of or attempt to perpetrate any sexual assault in the first degree, arson, robbery, kidnapping, hijacking of any public or private means or transportation, or burglary, or by administering poison, or causing the same to be done, kill another; or, whoever by willful and corrupt perjury or subornation of the same, shall purposely procure the conviction and execution of any innocent person, every person so offending shall be deemed guilty of murder in the first degree, and upon conviction thereof shall suffer death or shall be imprisoned in the Nebraska Penal and Correctional Complex during life. The punishment shall be determined and fixed in the manner provided by sections 29-2520 to 29-2524.

Neb. Rev. Stat. § 28-402 (Reissue 1975). Murder in the second degree, defined; penalty. (Page 52).

Whoever shall purposely and maliciously, but without deliberation and premeditation, kill another, every such person shall be deemed guilty of murder in the second degree; and upon conviction thereof shall be imprisoned in the Nebraska Penal and Correctional Complex not less than ten years, or during life.

Neb. Rev. Stat. § 28-403 (Reissue 1975). Manslaughter, defined; penalty. (Page 54).

Whoever shall unlawfully kill another without malice, either upon a sudden quarrel, or unintentionally, while the slayer is in the commission of some unlawful act, shall be deemed guilty of manslaughter; and upon conviction thereof shall be imprisoned in the Nebraska Penal and Correctional Complex not more than ten years nor less than one year.

Neb. Rev. Stat. § 29-2027 (Reissue 1975). Jury; verdict in trials for murder; conviction by confession; procedure to determine degree of crime. (Page 536).

In all trials for murder the jury before whom such trial is had, if they find the prisoner guilty thereof, shall ascertain in their verdict whether it be murder in the first or second degree, or manslaughter; and if such person be convicted by confession in open court, the court shall proceed by examination of witnesses in open court, to determine the degree of the crime, and shall pronounce sentence accordingly.

Neb. Rev. Stat. § 29-2101 (Reissue 1975). New trial; grounds. (Page 537).

A new trial, after a verdict of conviction, may be granted, on the application of the defendant, for any of the following reasons affecting materially his substantial rights: (1) Irregularity in the proceedings of the court, or the prosecuting attorney, or the witnesses for the state, or any order of the court, or abuse of discretion, by which the defendant was prevented from having a fair trial; (2) misconduct of the jury or the prosecuting attorney, or of the witnesses for the state; (3) accident or surprise which ordinary prudence could not have guarded against; (4) that the verdict is not sustained by sufficient evidence or is contrary to law; (5) newly discovered evidence material for the defendant which he could not with reasonable diligence have discovered and produced at the trial; or (6) error of law occurring at the trial.

Neb. Rev. Stat. § 29-2519 (1978 Cum. Supp.). Statement of intent. (Page 378 & 379).

The Legislature hereby finds that it is reasonable and necessary to establish mandatory standards for the imposition of the sentence of death; that the imposition of the death penalty in every instance of the commission of the crimes specified in section 28-303 fails to allow for mitigating factors which may dictate against the penalty of death; and that the rational imposition of the death sentence requires the establishment of specific legislative guidelines to be applied in individual cases by the court. The Legislature therefore determines that the death penalty should be imposed only for the crimes set forth in section 28-303 and, in addition, that it shall only be imposed in those instances when the aggravating circumstances

existing in connection with the crime outweigh the mitigating circumstances, as set forth in sections 29-2520 to 29-2524.

Neb. Rev. Stat. § 29-2520 (Reissue 1975). Murder; person found guilty; sentence; determination. (Page 591).

Whenever any person is found guilty of a violation of section 28-401, the district court shall within seven days fix a date for hearing on determination of the sentence to be imposed. Such determination shall be made by: (1) The judge who presided at the trial or who accepted the plea of guilty; (2) a panel of three judges including the judge who presided or accepted the plea, the two additional judges having been designated by the Chief Justice of the Supreme Court after receiving a request therefor from the presiding judge; or (3) a panel of three district judges named by the Chief Justice of the Supreme Court when such Chief Justice has determined that the presiding judge is disabled or disqualified after receiving a suggestion of such disability or disqualification from the clerk of the court in which the finding of guilty was entered.

Neb. Rev. Stat. § 29-2521 (Reissue 1975). Determination of sentence; procedure. (Page 591).

In the proceeding for determination of sentence, evidence may be presented as to any matter that the court deems relevant to sentence, and shall include matters relating to any of the aggravating or mitigating circumstances set forth in section 29-2523. Any such evidence which the court deems to have probative value may be received. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death. The court shall set forth the general order of procedure at the outset of the sentence determination proceeding.

Neb. Rev. Stat. § 29-2521.01 (1978 Cum. Supp.). Legislative findings. (Pages 379 & 380).

The Legislature hereby finds that:
(1) Life is the most valuable possession of a human being, and before taking it, the state should apply and follow the most scrupulous standards of fairness and uniformity;
(2) The death penalty, because of its enormity and finality, should never be imposed arbitrarily nor as a result of local prejudice or public hysteria;
(3) State law should be applied uniformly throughout the state and since the death penalty is a statewide law an offense which would not result in a death sentence in one portion of the state should not result in death in a different portion;
(4) Charges resulting from the same or similar circumstances have, in the past, not been uniform and have produced radically differing results; and
(5) In order to compensate for the lack of uniformity in charges which are filed as a result of similar circumstances it is necessary for the Supreme Court to review and analyze all criminal homicides committed under the existing law in order to insure that each case produces a result similar to that arrived at in other cases with the same or similar circumstances.

Neb. Rev. Stat. § 29-2521.02 (1978 Cum. Supp.). Criminal homicide cases; review and analysis by Supreme Court; manner. (Page 380).

The Supreme Court shall within a reasonable time after July 22, 1978, review and analyze all cases involving criminal homicide committed on or after April 20, 1973. Such review and analysis shall examine (1) the facts including mitigating and aggravating circumstances, (2) the charges filed, (3) the crime for which defendant was convicted, and (4) the sentence imposed. Such review shall be updated as new criminal homicide cases occur.

Neb. Rev. Stat. § 29-2521.03 (1978 Cum. Supp.). Criminal homicide cases; appeal; sentence; Supreme Court review. (Page 380).

The Supreme Court shall within a reasonable time after July 22, 1978, review and analyze all cases involving criminal homicide committed on or after April 20, 1973. Such review and analysis shall examine (1) the facts including mitigating and aggravating circumstances, (2) the charges filed, (3) the crime for which defendant was convicted, and (4) the sentence imposed. Such review shall be updated as new criminal homicide cases occur.

Neb. Rev. Stat. § 29-2521.03 (1978 Cum. Supp.). Criminal homicide cases; appeal; sentence; Supreme Court review. (Page 380).

The Supreme Court shall, upon appeal, determine the propriety of the sentence in each case involving a criminal homicide by comparing such case with previous cases involving the same or similar circumstances. No sentence imposed shall be greater than those imposed in other cases with the same or similar circumstances. The Supreme Court may reduce any sentence which it finds not to be consistent with sections 29-2521.01 to 29-2521.04, 29-2522, and 29-2524.

Neb. Rev. Stat. § 29-2521.04 (1978 Cum. Supp.). Criminal homicide cases; Supreme Court review and analysis; district court; provide records. (Page 380).

Each district court shall provide all records required by the Supreme Court in order to conduct its review and analysis pursuant to sections 29-2521.01 to 29-2521.04, 29-2522, and 29-2524.

Neb. Rev. Stat. § 29-2522 (Reissue 1975). Sentence; death; life imprisonment; determination of death in writing. (Page 592).

After hearing all of the evidence and arguments in the sentencing proceeding, the judge or judges shall fix the sentence at either death or life imprisonment, but such determination shall be based upon the following considerations:

(1) Whether sufficient aggravating circumstances exist to justify imposition of a sentence of death; or

(2) Whether sufficient mitigating circumstances exist which approach or exceed the weight given to the aggravating circumstances.

In each case in which the court imposes the death sentence, the determination of the court shall be in writing and shall be supported by written findings of fact based upon the records of the trial and the sentencing proceeding, and referring to the aggravating and mitigating circumstances involved in its determination.

Neb. Rev. Stat. § 29-2523 (Reissue 1975). Aggravating and mitigating circumstances, defined. (Pages 592 & 593).

The aggravating and mitigating circumstances referred to in sections 29-2521 and 29-2522 shall be as follows:

(1) Aggravating Circumstances:

(a) The offender was previously convicted of another murder or a crime involving the use or threat of violence to the person, or has a substantial history of serious assaultive or terrorizing criminal activity;

(b) The murder was committed in an apparent effort to conceal the commission of a crime, or to conceal the identity of the perpetrator of a crime;

(c) The murder was committed for hire, or for pecuniary gain, or the defendant hired another to commit the murder for the defendant;

(d) The murder was especially heinous, atrocious, cruel, or manifested exceptional depravity by ordinary standards of morality and intelligence;

(e) At the time the murder was committed, the offender also committed another murder;

(f) The offender knowingly created a great risk of death to at least several persons;

(g) The victim was a law enforcement officer or a public servant having custody of the offender or another; or

(h) The crime was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of the laws.

(2) Mitigating Circumstances:

(a) The offender has no significant history of prior criminal activity;

(b) The offender acted under unusual pressures or influences or under the domination of another person;

(c) The crime was committed while the offender was under the influence of extreme mental or emotional disturbance;

(d) The age of the defendant at the time of the crime;

(e) The offender was an accomplice in the crime committed by another person and his participation was relatively minor;

(f) The victim was a participant in the defendant's conduct or consented to the act; or

(g) At the time of the crime, the capacity of the defendant to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental illness, mental defect, or intoxication.

Neb. Rev. Stat. § 29-2524 (1978 Cum. Supp.). Existing procedures; act does not repeal. (Page 381).

Nothing in sections 24-342, 28-303, 28-313, 29-2519 to 29-2546 and sections 29-2521.01 to 29-2521.04 shall be in any way deemed to repeal or limit existing procedures for automatic review of capital cases, nor shall it in any way limit the right of the Supreme Court to reduce a sentence of death to a sentence of life imprisonment in accordance with the provisions of section 29-2308, nor shall it limit the right of the Board of Pardons to commute any sentence of death to a sentence of life imprisonment.

Neb. Rev. Stat. § 29-2524.01 (1978 Cum. Supp.). Criminal homicide; report filed by county attorney; contents. (Page 381 & 382).

Each county attorney shall file a report with the State Court Administrator for each criminal homicide case filed by him. The report shall include (1) the initial charge filed, (2) any reduction in the initial charge and whether such reduction was the result of a plea bargain or some other reason, (3) dismissals prior to trial, (4) outcome of the trial including not guilty, guilty as charged, guilty of a lesser included offense, or dismissal, (5) the sentence imposed, (6) whether an appeal was taken, and (7) such other information as may be required by the State Court Administrator. Such report shall be filed not later than thirty days after ultimate disposition of the case by the court.

Neb. Rev. Stat. § 29-2524.02 (1978 Cum. Supp.). State Court Administrator; criminal homicide report; provide forms. (Page 382).

The State Court Administrator shall provide all forms necessary to carry out sections 29-2524.01 and 29-2524.02.

Neb. Rev. Stat. § 29-2528 (Reissue 1975). Conviction; punishment is capital; writ of error; suspension of execution; hearing. (Page 594).

In all cases of conviction when the punishment shall be capital, the judges or court shall allow such writ of error as a matter of right, and shall order a suspension of the execution until such writ of error shall be heard and determined. Upon hearing such writ of error, it shall order the prisoner to be discharged, a new trial to be had, or appoint a day certain for the execution of the sentence, as the nature of the case may require.

STATEMENT OF THE FACTS

1. PRE-ARREST PHASE

In the late evening hours of August 9, 1977, or in the early morning hours of August 10, 1977, the Defendant went to the home of a friend, Patricia A. McGarry. Prior to going to her home, he had purchased a handgun and went to a small lake outside the city limits of Lincoln, Nebraska, to commit suicide. He had been suffering extreme mental and emotional stres due to a history of mental illness and his recently dissolved marriage. From the time he arrived at the lake to the time he arrived at Miss McGarry's home, the Defendant consumed an unknown amount of whiskey, Columbian marijuana mixed with PCP (also known as "angel dust"), an unknown amount of amphetamines and a number of LSD tablets. During this period of time he also consumed a number of bottles of beer and was still drinking beer when he arrived at Miss McGarry's residence.

Miss McGarry had been a very close friend and confidant of the Defendant for some time. He had established a very close personal relationship with both Miss McGarry and her small child. Therefore, he went to her house to discuss the personal problems mentioned above.

When the Defendant entered the residence, only Miss McGarry and her small child were present. The child was in a second floor bedroom asleep during the entire time the Defendant was in the apartment. While there, the Defendant went into a rambling monologue concerning his personal problems. He continued to consume beer. During this conversation, a friend of Miss McGarry's, a Catherine M. Brooks, entered the residence. Though the Defendant did not know her very well, she was a good friend of Miss McGarry's. They all sat around and talked for an undetermined amount of time. Again, the discussion centered on the Defendant's depression and a discussion of his intention to commit suicide.

Sometime during the conversation, the Defendant went to the second floor of the apartment to use the bathroom. After using the bathroom, he started back down to the first floor. While in the stairwell, he began to experience hallucinations. He believed that his former wife was standing at the bottom of the stairs yelling at him and threatening him. In reality, it appears that the person

standing at the bottom of the stairs was Miss Brooks. In response to his hallucinations, he entered into an argument with both of the women. A struggle took place. The women apparently believed that he was going to use the pistol that he had to commit suicide. During the struggle over the handgun, Miss McGarry was shot and killed. A further struggle took place between the Defendant and Miss Brooks that culminated in her being shot and killed. From the record, it appears that there were no witnesses to this incident. After both women were shot, the Defendant left the residence.

Upon leaving the residence, the Defendant went to his home and attempted to sleep. From the record, it appears that he was still in an unstable frame of mind. Therefore, after stopping for a number of hours at a residence of a friend, he left Lincoln, Nebraska. He roamed over a three state area for the next six or seven days. During that period of time, he is alleged to have committed other crimes. These are the crimes or other unlawful acts that the prosecution introduced in the trial. In any event, he returned to Lincoln, Nebraska and was arrested by members of the Lincoln Police Department.

Upon being taken into custody, the law enforcement officers noted his shabby and ill-kept appearance. He appeared to also be somewhat disoriented. In any event, after intensive interrogation without the benefit of counsel, the Defendant gave a full statement to the police. In essence, he admitted what he did remember of the acts, such admissions later substantiated by the evidence presented at trial by both the prosecution and the defense. Basically, he stated that he could not remember the nature or quality of his actions during those past seven days. The statement also included references to lead the examining psychiatrists and psychologists to believe that the Defendant was suffering from some form of severe mental illness during this period of time.

2. ARREST AND DETENTION

After the Defendant's arrest, he expressed on numerous occasions his desire to have counsel present prior to making any statements to the police. In fact, he named a specific attorney he desired to talk to. He even went so far as to give the attorney's card to one of the police officers so that he could be contacted. However, no

attorney was contacted and the officers, though admitting that they recall the Defendant mentioning this attorney's name, denied that he requested his presence prior to giving a statement.

The statement was taken in the office of the Assistant Police Chief. A detective was also present. Both of them were armed. The Defendant was brought into this air conditioned room still wet from the outside elements. He was clothed only in a pair of pants. He had no shirt, towel, socks, or shoes. Further, he had not slept for some time. At the conclusion of the statement, he was placed in the Lincoln City Jail and was not allowed to contact counsel. His first contact with an attorney was an inadvertent discussion with one of his present attorneys. These attorneys were later appointed to represent him.

3. PRE-TRIAL MOTIONS

One day after his arrest, the Defendant was arraigned in Lancaster County Court. He was charged with two counts of murder in the first degree and one count of first degree sexual assault. (Appendix D) (T42). Once he was arraigned in Lancaster County District Court, his counsel filed a number of Motions. They filed a Motion for Disclosure (Appendix E; T48) that was sustained (T314). They also filed a Motion to Discover and Inspect (Appendix F; T49) that was also sustained (T52; 314). As is evident from their contents, these Motions were based upon constitutional and Nebraska statutory law. Also, as part of counsel's attempt to have the Defendant's competency to stand trial evaluated, he filed a Motion to Produce Materials for Psychiatric Examination (Appendix G; T151-3). This was an attempt to allow the examining psychiatrist to have access to what information the police had concerning the Defendant's mental status prior to, during and after the consummation of the criminal acts alleged.

Though Defendant's Motions concerning Discovery were sustained, it became clear during and after the trial that the prosecution had been in possession of vast amounts of evidence that, under the appropriate constitutional and statutory provisions, they were ordered to disclose. However, none of this came to light until <u>after</u> the trial. The contents of this material went directly to the issue of the Defendant's mental status before, during and after the commission of

these crimes. They were absolutely material and relevant to his proferred defense of insanity. However, due to the Defendant's lack of knowledge of the existence of these materials, he was forced to go to trial without their benefit.

4. THE TRIAL

Shortly before the beginning of the trial, the Court held a hearing on two Motions filed by Defendant's counsel to exclude certain evidence from use in the trial. The first was a Motion in Limine that concerned large numbers of close-up, colored photographs of the crime scene in Nebraska as well as a crime scene in Iowa (Appendix H; T166). The second Motion in Limine concerned the use of evidence of other acts or crimes not related to the ones charged (Appendix I; T168). This concerned the use of evidence from two other states of acts that were totally unrelated to what allegedly occurred in Lancaster County. Subsequent to trial, the Court entered an Order excluding a very small and insignificant amount of the evidence that the defense attempted to have suppressed from presentation before the jury.

On April 17, 1978, the trial based upon the information in Appendix D began. During the trial, the prosecution presented vast amounts of evidence of acts allegedly committed by the Defendant in other states. This included the testimony of a woman who allegedly was shot and raped by the Defendant in Minnesota. Also, large numbers of colored photographs of crime scenes in other states as well as the crime scene in Lincoln, Nebraska, were introduced and given to the jury. These photographs were, to say the least, gruesome and inflammatory. All of the above-mentioned evidence was introduced and received into evidence over the strenuous objection of counsel. On May 1, 1978, the trial was concluded and the jury went into deliberation.

5. INSTRUCTION OF JURORS

At the conclusion of evidence, the Court held a hearing, in camera, concerning proposed jury instructions. Though the Court had already put together a set of instructions, it informed counsel for both parties that it would entertain written requests for alternative or additional instructions. Both sides submitted such instructions.

The basic subject matter of the proposed instructions proffered by the defense centered on the Defendant's insanity defense. Therefore,

defense counsel requested, in writing, two instructions concerning the potential dispositions available if the jury would return a verdict of not guilty by reason of insanity. (Appendix J and K)(T218; 220). These instructions accurately stated the prevailing statutory law concerning this issue. Counsel also requested an instruction concerning intoxication as a defense to a specific intent crime. (Appendix L)(T219). Again, this instruction accurately stated the prevailing law of Nebraska. All of these instructions were supported by evidence that had been introduced at trial. Neither of these areas were covered in the standard Nebraska Jury Instructions. However, upon the objection of the State, the Court refused to give these three instructions.

After the conclusion fo this in camera hearing, the Court instructed the jury. They then retired to deliberate. In the evening hours of May 1, 1978, the jury returned verdicts of guilty on all three counts.

6. SENTENCING PHASE

After the rendition of the verdicts the Court ordered that a Pre-Sentence Report be compiled. On May 9, 1978, the Defendant filed a Motion for New Trial. (Appendix N)(T273). As is evident from the contents of this Motion, it was based on numerous allegations of error. A hearing was held on the Motion on June 2, 1978 (T330). During the hearing defense counsel submitted as exhibits, police reports that had been in the possession of the prosecution that contained information that, under constitutional and statutory law, should have been disclosed to the defense. These police reports contained information that clearly would have assisted defense counsel in establishing the Defendant's insanity or mental disability at the time the crimes were committed. (Appendix M.) As is clear from these reports, this material was also relevant concerning the issue of sentencing. In any event, on June 21, 1978, the Court entered an Order overruling Defendant's Motion for New Trial (T281-7).

On June 23, 1978, the Defendant and his counsel appeared before a three judge panel in the Lancaster County District Court for sentencing (T331). Both sides presented evidence and oral argument concerning the appropriate sentence. One matter that was noted was the fact that the new procedures used in comparing various homicide cases

for the purpose of sentencing were inoperable. That is, that it was impossible to evaluate the records that were in the possession of the Clerk of the Nebraska Supreme Court. The State, in fact, agreed that this was the case. No organized or systemized set of procedures were then available for such evaluation. In any event, the defense strongly argued that the death penalty in this case was totally inappropriate. Much of the argument was based on considerations regarding the Defendant's mental disability. However, on June 30, 1978, the three judge panel sentenced the Defendant to death by electrocution on both counts of first degree murder, the sentences to be served consecutively. Further, they sentenced the Defendant to not less than 8 and one third years nor more than 25 years on the charge of first degree sexual assault (T288-98). They scheduled his execution date for the fall of 1978.

7. NEBRASKA SUPREME COURT REVIEW

Shortly after the rendition of sentence, defense counsel filed notice of appeal to the Nebraska Supreme Court along with other appropriate Motions and Affidavits. The issues presented concerned errors of law as well as the unconstitutional sentences rendered by the Court. See, Appendix O for order of sentence and commitment (T288-98). On December 18, 1979, the Nebraska Supreme Court rendered its opinion affirming both the conviction and sentence of the Defendant. (Appendix A) From the Court's opinion, it was clear that they failed to adequately discuss and resolve the factual issues raised in the Defendant's brief. Further, it became abundantly clear that, as indicated in the dissent of Chief Justice Krivosha, that the majority of the Court completely misconstrued and misapplied Nebraska's death penalty and review statutes.

Therefore, defense counsel filed a Motion for Rehearing, Stay of Mandate and Brief in Support Thereof shortly after the Supreme Court's decision. (Appendix T.) The essence of the argument contained in the brief on this Motion centered on the Court's inadvertent or conscious refusal to address and resolve the factual questions raised as well as the constitutionality of the Defendant's death sentences.

However, the Court overruled the Motion for Rehearing and issued

a warrant setting the execution of the Defendant to take place in May of 1980. (Appendix D) Subsequent to the Court's ruling, defense counsel filed with the Nebraska Supreme Court Application for Stay of Mandate Pending Application for Certiorari to the United States Supreme Court with Affidavit and Showing re Existence of Federal Questions. (Appendix Q) Upon receipt of this Application, an indefinite stay of mandate was issued by the Nebraska Supreme Court pending Application for Certiorari to this Honorable Court. These matters are now before this Honorable Court.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

1. Defense counsel continuously raised, throughout the pre-trial, trial and post conviction proceedings, the issue of the prosecution's conscious, wilful and prejudicial withholding of evidence from the defense. Large amounts of exhibits and testimony were introduced to substantiate this violation of constitutional and Nebraska statutory law. However, the Nebraska Supreme Court found that no prejudicial error or harm to the Defendant occurred. Further, they found that there was no error of law committed by the State or the trial court.

2. Defense counsel filed numerous Motions and had lengthy hearings on the State's use of massive amounts of gruesome, cumulative and inflammatory photographs as well as introduction of irrelevant and inflammatory testimony. Attempts were made to resolve this issue prior to trial. However, all efforts in this regard failed. The Nebraska Supreme Court, in a very superficial way, held that the Defendant was not prejudiced by the use of this evidence. It failed to adequately resolve the constitutional issues raised in this regard.

3. Defense counsel submitted timely, written jury instructions centering on the Defendant's defense of insanity. All the requested instructions accurately reflected the prevailing law in the State of Nebraska at that time. The standard Nebraska Jury Instructions did not adequately cover these areas. Further, the giving of these instructions was supported by the evidence adduced at trial. However, the Nebraska Supreme Court determined that the trial court did not err in refusing these instructions and, in its opinion, failed to adequately address or resolve the constitutional issues raised.

4. Defense counsel strenuously argued both to the three judge sentencing panel as well as to the Nebraska Supreme Court, the inappropriateness of the application of the death penalty in this case. After misconstruing and misapplying Nebraska statutes, the three judge sentencing panel concluded that the death penalty was appropriate in this case. This was also the opinion of the majority of the Nebraska Supreme Court. However, the Chief Justice, in his dissent, clearly outlines the inappropriate and unconstitutional nature of the application of the death penalty in this case.

5. Defense counsel, most evident in the Motion for Rehearing, raised the issue of the unconstitutionality of the Nebraska death penalty and review statutes. When comparing it to decisions by this Honorable Court, it is clear that those arguments have substance. However, when this issue was raised before the Nebraska Supreme Court, they refused to issue a written opinion underlying their reasons for overruling the Motion for Rehearing. However, in the dissent of the Chief Justice, it becomes abundantly clear that, when the statutes are considered in light of the present state of the law, they are clearly unconstitutional in both their construction and application.

REASONS WHY THE WRIT SHOULD BE GRANTED

I.

THE PROSECUTION'S CONSCIOUS, WILLFUL AND PREJUDICIAL WITHHOLDING OF RELEVANT AND FAVORABLE EVIDENCE, IN DIRECT VIOLATION OF CONSTITUTIONAL LAW, NEBRASKA STATUTORY LAW AND THE ORDERS OF THE TRIAL COURT, SO PREJUDICED THE PETITIONER AS TO DENY HIM HIS RIGHTS TO A FAIR TRIAL, DUE PROCESS OF LAW AND EQUAL PROTECTION OF THE LAW GUARANTEED UNDER THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

On November 23, 1977, defendant's counsel filed in the District Court of Lancaster County a Motion for Disclosure (T48). The Motion specifically asked that "the Office of the County Attorney in this criminal litigation to make timely disclosure to counsel for the defendant of the existence of any evidence known to the prosecutor that tends to negate the guilt of the accused, mitigate the degree of his offense, or reduce the punishment, pursuant to law as set down by the Court in United States v. Agurs, 427 U.S. 97, 96 S.Ct. 2392 (1976); Giles v. Maryland, 386 U.S. 66, 17 L.Ed.2d 737 (1967); and Brady v. Maryland, 373 U.S. 83, 10 L.Ed.2d 215 (1963)." The Court sustained defendant's Motion for Disclosure on November 25, 1977 (T314). On November 23, 1977, counsel for the defendant also filed a Motion to Discover and Inspect (T49). Among other things, the defendant requested "a full, complete and unabridged copy of the defendant's statement pursuant to the wording and intent of Neb. Rev. Stat. § 29-1912(a) (Reissue 1975), 'the names and current addresses of any and all witnesses on whose evidence the charge is based, whether or not the State plans to call such witnesses,' and 'any and all documents, papers, books, accounts, letters, photographs, objects, or other tangible things of whatsoever kind or nature which could be used as evidence by the State in the prosecution of the above docketed matter'" (T49). On November 25, 1977, the Court sustained the defendant's Motion to Discover and Inspect in full (T314).

Prior to the filing of these motions, a hearing was held in the Lancaster County District Court before the Honorable William C. Hastings on the issue of the defendant's competency to stand trial

(See separate transcript of competency hearing; hereinafter referred to as CH). During the competency hearing, Dr. Whitney Kelley, M.D., was called to testify as to the results of his examination of the defendant as to the issue presented (CH4-24). As part of his testimony, Dr. Kelley clearly stated that he needed more information than was provided him to come to an accurate conclusion as to the defendant's mental status. He specifically referred to information that could only be found in police reports (CH:9-11; 20-21). At the conclusion of the hearing, defendant's counsel specifically requested the Court to order the State to provide defendant's counsel with police reports that were referred to by Dr. Kelley (CH:42-46). Said request had already been made in the form of a written motion that had been filed in the Clerk of the District Court but cannot be found in the transcript of this case. In any event, the Court directed the State to provide it with such reports for its examination as to relevant material (CH:46-47). Though this written motion cannot be found in the transcript of this case, the Court referred to it at the conclusion of the competency hearing (CH:47; 10). A specific request was made to the Court for these materials by Dr. Kelley as evidence in his letter of September 30, 1977 (first page, second paragraph) (T70). As the record clearly indicates, the State never complied with the defendant's request for these police reports even though the Court had directed it to supply it with such reports and Dr. Kelley had made specific comments as to his need for them. Defendant's counsel, on February 2, 1978, again filed a written motion to produce materials for the psychiatric examination of the defendant (T151). The motion was argued and submitted to the Court on February 3, 1978, however, the Court failed to rule on the motion (T315). Subsequent to February 2, 1978, the State again failed to produce the information requested (See transcript of Requested Proceedings, Volume 1; 99-135).

As is apparent from the record, the theory of the defense in this case was one of insanity. Consequently, all of the above motions were made in preparation of a defense on this theory. There is no question that the State had notice of the proposed defense of insanity (T196). Consequently, the State had to be very much aware of the type and nature of evidence that would have assisted defense

counsel in the preparation of this defense. The State was further aware of the fact that defense counsel, in various hearings and mutual depositions, was very interested in any evidence that would support the defendant's claim that he had consumed large amounts of alcohol and controlled substances on or about the time of the homicides.

The record as to the proceedings for discovery and inspection of tangible evidence in the possession of the State is rather complete. There were at least four separate hearings concerning the examination and production of tangible evidence in the possession of the State (INDEX:3-6). However, after the trial itself was concluded, and during the process of discovery for preparation of the defendant's hearing on his Motion for a New Trial, it became clear that the State had been in possession of vast amounts of relevant evidence that had been specifically requested by the defense but had never been produced. This newly discovered evidence was both testimonial and tangible in nature. Further, there is clear evidence that the State consciously suppressed this evidence that was favorable to the defendant and could have been extremely valuable in the preparation of his defense.

The hearing on the defendant's Motion for a New Trial was held on June 7, 23, and 30, 1978 (Requested Proceedings -- Volume 8; hereinafter referred to as RP). As part of the preparation for this hearing, defense counsel subpoenaed all the police records concerning this case from their custodian. Such records were produced and given to defense counsel for examination. As a result of this examination it was discovered that the State had had in its possession, since the initiation of this action, vast amounts of evidence that would have been of great assistance to the defendant in the preparation of his defense. A brief description of the evidence contained in these police reports will clearly indicate and show their value to the defendant in the preparation of his defense.

In all, defense counsel had marked and received into evidence 18 separate police reports that it found particularly relevant as to the issue of newly discovered evidence, as well as in support of its claim that the prosecution had consciously concealed such evidence from the defendant with knowledge that it would have been assistant to him.

A brief discussion of each of these exhibits will substantiate

the defendant's contention as to their value to his defense. All of these were received into evidence in the hearing on the defendant's Motion for a New Trial (RP:3967-78).

1. Exhibit 2B-1: This exhibit was an interview with Miss Janice M. Lamborn concerning the alleged sexual assault committed on her by the defendant. The report contains statements made by Miss Lamborn that contradict the testimony she gave at the trial concerning this matter.

2. Exhibit 2B-2: This is a police report concerning the investigation of the McGarry apartment and crime scene. It contains a statement by the son of one of the slain women. It further contains evidence that a bottle of liquor that was present in the early evening hours of the night of the slayings was missing and unaccounted for. This, of course, would have assisted the defendant is substantiating his testimony concerning his consumption of alcohol that evening.

3. Exhibit 2B-3: This is a police report concerning an interview of a Miss Ode concerning the activities of Miss McGarry the night that she died. It contains lengthy information and evidence as to her heavy consumption of marijuana and a statement that when the witness left her she was "high or happy this being from smoking some marijuana."

4. Exhibit 2B-4: This is a police report concerning an interview with the defendant's former spouse. She makes statements in the report that would substantiate his history of drug usage. This, of course, was an important subject matter at the trial.

5. Exhibit 2C-1: This is a police report containing a brief interview with a Mr. Kasparek who sold the defendant a .22 caliber pistol. In the report, Mr. Kasparek stated that the defendant "had appeared to be rather fidgety or nervous." This statement is a direct contradiction to his testimony at the trial concerning defendant's mental status at that time.

6. Exhibit 2C-2: This is a police report of an interview with Miss Lamborn. In it, the interviewing officer states on numerous occasions that she feels that Miss Lamborn is not telling the full truth about the alleged sexual assault committed on her by the defendant. She further relates that Miss Lamborn told her that she was not frightened of Mr. Williams, the defendant in this case. This last statement, of course, is in direct contradiction to her testimony at trial.

7. Exhibit 2C-3: This is a police report of an interview with a Miss Sue Johnson. She testified during the trial that the defendant had contacted her on two occasions prior to the time that the two women were slain. In her testimony she stated that he had been drinking when he appeared at her residence but did not appear to be disoriented or extremely intoxicated. However, in this interview with the police officer, she stated on numerous occasions that he was "very intoxicated," "he was really messed up," that this condition was "very unusual for him" that he told her that "he was all screwed up" and that on both occasions he was in possession of baggies of marijuana. The contradictions between her testimony at trial and her statements to the interviewing officer are clear.

8. Exhibit 2C-4: This is a police report containing another interview with Merrilee Williams, the defendant's former spouse. She makes statements to the investigating

officer that, again, would have substantiated the defendant's contention that he was deeply involved in drug usage. It further indicates that Miss McGarry was clearly involved in the drug culture.

9. Exhibit 2C-5: This is another interview with the defendant's former spouse. In it, the former Mrs. Williams made statements concerning the defendant's bizarre behavior and thought patterns and general mental status. She also made a statement concerning her belief that he was "very capable of getting rid of himself." The value of such statements are obvious when one considers the defense posture in this case.

10. Exhibit 2C-6: This is a police interview with a Mr. McCarthy. It contains references to activities and possible witnesses, the knowledge of which, would have been of assistance to the defense had they been available.

11. Exhibit 2C-7: This is another police interview with the defendant's former spouse. In it, she again makes statements concerning the defendant's bizarre behavior and state of mind. Its value to the defense is obvious.

12. Exhibit 2C-8: This is a report of the findings of an officer who had administered a polygraph examination to Miss Lamborn. The polygraph examiner states that he feels that Miss Lamborn is only telling a substantial portion of the truth regarding the facts surrounding the alleged sexual assault. He also reports that Miss Lamborn again stated that "she did not actually feel that Williams would shoot her at that time." Again, this statement is in direct contradiction of her testimony at trial.

13. Exhibit 2C-9: This is a police report of an interview with Miss Lamborn and a Mr. Malone. The interviewing officer expresses the opinion in the report that Miss Lamborn is "prone to exaggerate." This is in reference to her statements concerning the alleged sexual assault committed by the defendant on her. The report also contains statements by Mr. Malone as to Mr. Williams' state of mind. He is quoting as stating that "Mr. Williams was not normally this violent type of guy and that something drastic would have had to happen to have caused him to flip out to do this type of thing. Mr. Malone states that he realized that the individual was very sick and that he needs help." Again, such evidence is of obvious value to the defense.

14. Exhibit 2D-1: This is a police report of an interview with a Mr. Sutton who worked with the defendant at National Crane Corporation. During the interview Mr. Sutton makes numerous relevant statements concerning his observations of the defendant's state of mind and behavior immediately prior to the homicides. On numerous occasions he refers to what he observed as to be a "drastic change in personality" in the defendant immediately prior to these homicides. He goes on to give examples of the defendant's preoccupation with religion and related subjects. This type of evidence would have been extremely important in evaluating the defendant's state of mind and prior to and on the date of the acts that were the subject matter of the trial. Reports such as these are examples of what the psychiatrists were attempting to obtain from the State so as to more accurately examine and diagnosis the defendant.

15. Exhibit 2D-2: This is a police report concerning the serving of a search warrant and the subsequent search of the defendant's residence. It describes and

lists the various objects seized from his residence on April 16, 1977. The inventory of the objects seized includes "approximately 200 Watchtower Jehovah Witness Magazines from 1974-1976." The existence of these magazines would have substantiated the psychiatrists' comments about the defendant's preoccupation with religion. During the trial the State attempted to present this preoccupation as only a sham. These magazines were never shown to defense counsel in any of the discovery and examination proceedings and to this date have never been accounted for. More importantly, this report lists the seizure of "one green steno note book, 6 by 9." The report lists verbatim quotes from this note book that clearly indicate that the defendant was in a bizarre state of mind when making the entries in this book. The contents of this book would have been invaluable in substantiating Dr. Kelley's diagnosis of paranoid schizophrenia that the defendant was suffering under at this period of time. Again, this note book was never shown to defense counsel and, as of this date, has never been accounted for. It is interesting to note that these items were all taken into custody and tagged into the property room. Why their existence was never made known to the defense has never been answered. Only the State knows where they are as of this date.

16. Exhibit 2D-3: This is a police report of an interview with a number of the defendant's co-workers at the National Crane Corporation. It contains information and observations as to the defendant's state of mind in the month immediately preceding the homicides that would have been extremely valuable to the defense.

17. Exhibit 2D-4: This is a police report containing an interview with a Miss Jackie Cook and Mr. George Ellis. Part of the report contains observations by Miss Cook as to the defendant's mental status. It must be noted that the State never listed her on their potential witness list. The report quotes Miss Cook as stating "that she always thought he was a little nuts, referring to Robert Williams." Again, this could have been another potential witness for the defense relative to the defendant's mental status.

18. Exhibit 2D-5: This is the cover sheet found on the copy of the defendant's statement to Detective Ideen and Assistant Chief of Police LaPage. This cover sheet was referred to in the argument concerning the defendant's Motion to Suppress. The first knowledge of the existence of this cover sheet came at the hearing on the defendant's Motion for New Trial. It had obviously been removed from the copy given to defense counsel. Had defense counsel been aware of the statement contained in this exhibit, they could have more effectively represented the defendant in the hearing on his Motion to Suppress. The reason why this cover sheet was removed from the copy of the statement given to defense counsel has never been explained. However, considering the nature of the statement contained in it, it is not difficult to arrive at possible motives for this action.

With only this brief discussion and description of these exhibits, their potential value to the defense is obvious. These exhibits contain information that clearly should have been given to defense counsel pursuant to the Court's Orders concerning discovery and disclosure. The facts contained in some of these exhibits raise further questions of possible illegal conduct on the part of the prosecution and certain

members of the Lincoln Police Department. In any event, the fact that defense counsel was never made aware of the contents of these exhibits resulted in clear prejudice to the defendant's right to a fair and impartial trial.

This Court must be made aware of another occasion where the defendant was denied valuable and relevant information, that was clearly discoverable, due to the actions of Assistant Chief of Police LaPage. On March 8, 1978, defense counsel filed a Motion for Leave to Take the Deposition of Merrilee Williams, the defendant's former spouse (T182). After the filing of this motion, defense counsel was advised by the prosecution that they had no knowledge of Mrs. Williams location and had no way of contacting her. Consequently, defense counsel were never able to take her deposition. She, of course, would have been a key defense witness concerning the defendant's mental condition up to and about the time of the homicides.

On June 12, 1978, a pre-sentence report concerning the defendant was submitted to the District Court to be considered during the sentencing process. Defense counsel, of course, was given access to the contents of this report. Page 29 of the pre-sentence report contains the statement of Mrs. Yvonne (Bonnie) Rearick, the daughter of the defendant's former spouse. In the second paragraph of her statement to the probation officer she states that: "One day my mother called me to bring some clothes out to the airport that she was leaving town on advice of the police." She said that LaPage (Assistant Chief of Police) had given her some money." In the same paragraph she states that she last saw her mother "two weeks after the murders. She writes to me." These statements clearly contradict the information given to defense counsel by the State. The fact that one of the key prosecution witnesses (Assistant Chief of Police LaPage) assisted in removing a key potential witness from the jurisdiction raises legal questions that are beyond the scope of this brief.

The constitutional duties of the prosecution as to disclosure of evidence to the defendant are well established. In the case of Brady v. Maryland, 373 U.S. 83 (1963), this Court clearly and distinctly stated the essence of these duties:

> We now hold that the suppression by the

> prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution.
> at 373 U.S. 87.

Consequently, whether the suppression of this evidence was an act of omission or commission is irrelevant. The Brady rule places an affirmative burden on the prosecution to come forward with such evidence. This rule has, time and again, been reaffirmed by courts in every jurisdiction. See, United States v. Agurs, 427 U.S. 97 (1976); Giglio v. United States, 405 U.S. 150 (1972); Ogden v. Wolff, 522 F.2d 816 (8th Cir. 1975); Martin v. Parratt, 412 F. Supp. 544, aff'd., 549 F.2d 50 (8th Cir. 1977); Jones v. Jago, 575 F.2d 1164 (6th Cir. 1978); United States v. Blalock, 449 F.Supp. 916 (N.D. Ga. 1978) and Evans v. Janing, 489 F.2d 470 (8th Cir. 1973). Therefore, due to the numerous denials of the defendant's various rights to due process of law by the prosecution in this case, a new trial is mandated. The "Brady Doctrine" certainly does not put beyond its reach relevant information simply because it is contained in police reports under the control of the state. See, Goldberg v. United States, 425 U.S. 94 (1976); Swanner v. United States, 406 F.2d 716 (5th Cir. 1969); Wood v. Breir, 54 F.R.D. 7 (E.D. Wis. 1972); Boyd v. Gullett, 64 F.R.D. 169 (D.C. Maryland 1974); and Alexander v. Rizzo, 50 F.R.D. 374 (E.D. Pa. 1970). The prosecution's conduct in this regard is inexcusable.

II.

THE PROSECUTION'S SHOWING OF NUMEROUS GRUESOME, INFLAMMATORY COLORED PHOTOGRAPHS TO THE JURY, AND ITS INTRODUCTION OF VAST AMOUNTS OF CUMULATIVE, INFLAMMATORY AND PREJUDICIAL TESTIMONY, VIOLATED PETITIONER"S RIGHTS TO A FAIR TRIAL AND DUE PROCESS OF LAW AS GUARANTEED BY THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Prior to the trial of this matter, a hearing was held concerning the introduction of certain crime scenes and autopsy photographs related to the deaths of the two victims (T317). At that hearing, held on March 2, 1978, the State presented defendant's counsel and the Court with a large number of these photographs that the State expected to present at trial (Volume 1 - proceedings: 1-48). At that hearing,

the Court made a number of rulings as to the admissibility of certain of these photographs. Most of them were objected to by the defendant as gruesome, inflammatory, prejudicial and lacking in probative value. However, the Court overruled most of these objections and made a preliminary finding of admissibility to most of the photographs.

At the trial of this matter, the State introduced 22 photographs dealing with the Lincoln crime scene and the autopsies of the two victims (E3A through 3V: 2121-2183). These were the same photographs referred to above. Defendant's counsel objected to the introduction and use of most of these photographs on the grounds that they were inflammatory, gruesome, prejudicial and that whatever relevance or probative value they may have had was outweighed by their prejudicial effect. Defendant's counsel further objected on grounds that many of the photographs were cumulative in nature (2121-2183). However, the Court overruled the defense counsel's objections and admitted 22 photographs into evidence. Ultimately, of course, these photographs were given to the jury for their deliberations.

It is a well settled principle of law that "It is the duty of a prosecuting attorney to conduct the trial in such a manner as will be fair and impartial to the rights of the accused. Rules of evidence and conduct are prescribed to insure that the rights of the accused are maintained." State v. Smith, 187 Neb. 152, 187 N.W.2d 753, 755 (1971). However, by the State's introduction and use of this large number of gruesome and inflammatory photographs, the defendant had his right to a fair and impartial trial taken away. As defense counsel argued during the in camera proceedings concerning these photographs, most of them were of little evidentiary value relative to the elements of the crimes charged. This argument is even heightened when one considers that the defendant had already given two law enforcement officers a very complete statement admitting his involvement in the crimes charged. Their admission into evidence, along with more than 20 other photographs dealing with the defendant's alleged criminal conduct in other states, combined to create a degree of prejudice in the minds of the jurors that could not be overcome by extrinsic evidence or cautionary instructions.

The test as to the admissibility of photographs of a gruesome

nature was clearly set out by the Nebraska Supreme Court in State v. Robinson, 185 Neb. 64, 173 N.W.2d 443 (1970). The Robinson case was an appeal from a conviction of the defendant of murder in the first degree. The criteria and test set out by the Court as to the admissibility of gruesome photographs was as follows:

> For many years the Courts of this country have held that evidence of a gruesome nature and which may tend to inflame the passions of jurors should be excluded unless it has some probative value which outweighs its possible prejudicial effect. . ..
>
> The test is whether the evidence is relevant, and in determining the relevance the trial court is to weigh and balance the probative value of the pictures as against their possible prejudicial effect. . ..
>
> . . . our trial courts should be ever vigilant and guarded in dealing with such evidence. Except in cases of absolute necessity, prosecuting attorneys should avoid the use of doubtful evidence of this character. At 173 N.W.2d 446-447. (Emphasis added).

In a more recent case, the Court expanded upon and refined its holding in the Robinson case. In State v. Partee, 199 Neb. 305, 258 N.W.2d 634 (1977), the defendant, who was found guilty of murder in the second degree, appealed his conviction. One of the grounds for the appeal was the State's use, over defendant's objection, of 18 photographs of the murder victim and the crime scene. In affirming the conviction, the Court reaffirmed and further defined its holding in the Robinson case:

> The number of photographs, in and of itself, is not depositive, but rather all the circumstances of each case must be considered in determining whether the admission of a significant number of photographs was so prejudicial that it constitutes reversal error. An important consideration is whether a witness can effectively testify to the pertinent facts without the need of numerous photographs, or any photographs at all. This later consideration is particularly relevant to photographs taken in conjunction with an autopsy, as a pathologist can often testify in regard to the autopsy without the need of photographs. . ..
>
> Except in cases of absolute necessity, prosecuting attorneys should avoid the use of doubtful evidence of this character. (Citation Omitted). This caveat is particularly appropriate in cases where it is proper to admit some gruesome photographs in evidence; in such cases care is to be taken that no more photographs than are absolutely necessary are admitted. In cases, unlike the present case, where photographs are not necessary to enable the State to satisfy its

> burden of going forward with the evidence in establishing all the element of the crime charged, gruesome photographs should be excluded entirely.
> at 258 N.W.2d 638-639 (Emphasis added).

From a fair reading of these and other opinions of the Nebraska Supreme Court, it is clear that, among other things, three basic considerations apply to the admission of gruesome and inflammatory photographs: 1) whether the use of such photographs are absolutely necessary in proving the elements of the crime charged; 2) whether the probative value and relevance of such photographs outweigh their prejudicial effect; and 3) whether a witness can effectively testify to pertinent facts without the need to use such photographs. See, also, Neb. Rev. Stat. §§ 27-403 and 404(2) (Reissue 1975). In the case at hand, it should be abundantly clear from the record that there was no "absolute necessity." First, it must be remembered that the defendant's Motion to Suppress his statement implicating himself in these crimes was overruled by the Court on March 23, 1978 (597-602). The Court received into evidence cassette tapes, a long reel tape, and a typed transcript of the defendant's admissions concerning the crimes charged in the Information (3000-3014; 2954-2958; 3645-3646). In his statement, the defendant gave a full recitation as to the facts surrounding the shooting. In his statement, the defendant, in essence, admitted to most of the elements of the crimes charged. Consequently, to suggest that all of the photographs of the Lincoln crime scene and an autopsy were "absolutely necessary" to establish the elements of the crimes charged is ludicrous.

Next, there is the issue of whether a number of these photographs possessed such relevance and probative value as to outweigh their prejudicial effect on the jurors. It is admitted that all crime scene photographs stemming from a homicide case are gruesome and inflammatory. Some of them may have the degree of relevance and probative value as to outweigh their possible prejudicial effect. However, in the case at hand, the large number of photographs introduced and used by the State was clearly excessive. Since the State had such a large amount of evidence at its disposal from the crime scene, most of these photographs were simply cumulative in nature. Their cumulative nature certainly lessened their relevance and probative value.

Consequently, they were merely used to inflame and prejudice the jury against the defendant.

The final consideration noted above is whether a witness at the trial could effectively testify to pertinent facts without the need of these numerous photographs. In dealing with this issue it must be recalled that the cause of the two deaths was not a contested issue. Neither party contested the fact that the two women died from gun shot wounds that were not self-inflicted. Further, Dr. Harlan Papenfuss, a pathologist, testified at great length concerning the cause of death (2308-2338; 2344-2346). During his testimony he did not find it necessary to directly refer to or use photographs introduced by the State. Thus, the argument that he would not have been able to testify to pertinent facts without the use of at least some of these photographs is of no merit.

In essence, the State simply used these photographs to orchestrate an inflamed atmosphere of prejudice against the defendant. Due to the vast amount of evidence available to the State, the argument that such photographs were such an "absolute necessity" to the presentation of their case is without merit. The photographs themselves are of such inflammatory and prejudicial nature as to outweigh any argument allowing or requiring their admission on grounds of relevancy and probative value. Finally there can be little doubt that these photographs were not required to assist the witnesses in testifying to pertinent facts. However, the ultimate effect of the admission of this large number of gruesome photographs was to inflame and prejudice the minds of the jurors against the defendant. The degree of prejudice, in and of itself, denied the defendant his right to a fair and impartial trial. To suggest otherwise is to deny the common experience of man.

The prejudice created by the excessive and unwarranted use of the photographs was further expanded by the State's introduction of evidence of other crimes unrelated to the ones charged. During the defendant's trial the State called 36 witnesses to testify on its behalf (INDEX; 13-15). Of these witnesses, 16 testified directly concerning crimes allegedly committed by the defendant other than those charged in the Information. For example, Janice Lamborn testified

concerning an alleged sexual assault committed on her by the defendant a day after the homicides in question occurred (241-273). A Mary Ann Montgomery testified concerning the theft of her car in Iowa, said car allegedly stolen by the defendant (457-475). Wayne Rowe testified in graphic detail, and at length, concerning his discovery of his wife's body at their Iowa farm house. Said homicide was allegedly committed by the defendant long after the crimes at issue (489-505). Walter Behun testified at length about being kidnapped by the defendant in Minnesota (802-843). Finally, Katherine Billings testified in graphic detail concerning her allegation that the defendant shot her, took her to the country and raped her almost one week after the Lincoln incident. Said acts allegedly occurred in the state of Minnesota (1138-1162). As noted above, the State introduced vast amounts of exhibits at trial. Of these, a significant number of them related solely to crimes allegedly taking place outside the jurisdiction of Lancaster County and not related in any way to those charged in the Information. For example, the State introduced in excess of 35 such exhibits. Of these, 19 were enlarged color photographs, many of them of the body of Mrs. Wayne Rowe and the farm house in Iowa where she was killed (INDEX; 17-23). Though the testimony of these witnesses and the introduction of these exhibits was strenuously objected to by defense counsel, they were received into evidence by the Court. The State's argument concerning their admissibility was that they were introduced to show the elements of motive, intent and state of mind as it related to the crimes committed in Lincoln, Nebraska. All of this evidence was objected to by defense counsel and had previously been the subject of two motions in limine filed by the defense counsel that were overruled by the Court (T316; 317; 166; 168). None of this evidence, in any way, related directly to the crimes alleged in the Information on which the trial was had in that all of them were allegedly committed after the homicides were committed in Lincoln and, in fact, allegedly took place in Fremont, Nebraska, the states of Iowa and Minnesota.

The law in the State of Nebraska concerning the admission of evidence as to alleged crimes not charged in the Information, on which a trial is being held, has a long, established history. This

Court, in State v. Putnam, 178 Neb. 445, 133 N.W.2d 605 (1965), clearly set out the rules of law dealing with this issue:

> It is the general rule in this state that evidence of other crimes, even by the instrumentality of a confession, is not admissible to prove the guilt of the defendant of the particular crime charged. . .. It is well said that where the evidence of the other crime relates to another and entirely different transaction, and in no way tends to prove the fact and issue, it is not admissible, even though it tends to prove that the defendant was bad enough to commit a robbery. . ..
>
> To make evidence of other acts available in a criminal prosecution, some use for it must be found as evidence being a conspiracy, knowledge, design, disposition, plan, or scheme, or other quality, which is of itself evidence bearing on the particular act charged.
> at 133 N.W.2d 610.

The Nebraska Supreme Court, in a more recent case, defined the above mentioned rules. In State v. Casados, 188 Neb. 91, 195 N.W. 2d 210 (1972), the Court reversed the defendant's conviction of child stealing due to the fact that such prejudicial testimony and evidence was allowed to be received at his trial. In passing on this issue, the Court held that:

> In any event, proof of another distinct substantive crime is not admissible in a criminal prosecution unless there is some legal connection between the two upon which it can be said that one tends to establish the other or some essential fact and issue.
>
> Peculiarly applicable to criminal cases is the rule which prohibits the introduction of evidence of other wholly independent offenses as the basis for an inference that the defendant is guilty of the offense for which he is being tried . . .. One basic reason for the rule is that such evidence is apt to to be given too much weight, rather than too little, by the jury, thus resulting in the conviction of a defendant because he is a bad man and not because of his specific guilt of the offense with which he is charged.
> at 195 N.W.2d 213. (Emphasis added).

It has held on a number of occasions that such evidence is presumptively prejudicial to the rights of the defendant. State v. Murray, 187 Neb. 554, 192 N.W.2d 734, 735 (1971); State v. Riley, 182 Neb. 300, 154 N.W.2d 741, 744 (1967). This rule is especially applicable when it relates to evidence of crimes allegedly committed against third persons, such crimes not being alleged in the Information on which the trial is being held. See, State v. Franklin, 194

Neb. 630, 234 N.W.2d 610, 617, 618 (1975). The effect of the admission of such evidence, when it affects a substantial right of a defendant (e.g., fair trial), requires the reversal of the resulting conviction. See, Burgett v. Texas, 389 U.S. 109 (1967); Payne v. Arkansas, 356 U.S. 560 (1958); Gideon v. Wainwright, 372 U.S. 335 (1963). In cases where such evidence is allowed to be used by the prosecution, this Court must reverse the defendant's conviction unless it can satisfy itself that the trial court's errors in admitting such evidence were harmless beyond a reasonable doubt. See, Gilbert v. California, 388 U.S. 263 (1967); Fahy v. Connecticut, 375 U.S. 85 (1963). When one objectively considers the facts of this case, and the massive amount of evidence at the disposal of the prosecution, it should be clear that the introduction of evidence as to other crimes was an orchestrated attempt by the prosecution to characterize the defendant simply as a "bad man" so as to garner a conviction. See, C. McCormick, Evidence (2nd ed. 1972) § 190; 1 Wharton's Criminal Evidence (13th ed. 1972) § 240; 1 J. Wigmore, Evidence (3rd ed. 1940) § 57.

First, it is clear from the factual elements of offenses charged in the Information that there is no legal connection between them and the crimes allegedly committed by the defendant in other states. For example, what possible legal connection would there be between the crimes charged in the Information in this case and the offense of auto theft and kidnapping allegedly committed by the defendant while he was in Iowa and Minnesota? It certainly cannot be argued that the crimes charged in the Information and those just mentioned were part of one transaction or occurrence. Further, the material elements of auto theft and kidnapping are in no way similar or connected to the elements contained in the crimes charged in the Information. Consequently, proof of the crimes of auto theft and kidnapping could in no way be considered as proof of intent, motive or design relative to the crimes charged in the Information in Lancaster County. In essence, the evidence of other crimes committed in other states had no direct legal connection to those charged in Lancaster County and should have been excluded. See, United States v. Greenfield, 554 F.2d 179 (5th Cir. 1977); United States v. Taglione, 546 F.2d 194 (5th Cir. 1977);

United States v. McFayden-Snyder, 552 F.2d 1178 (6th Cir. 1977).

Secondly, the proof of these alleged other crimes was not needed to prove any of the elements of the crimes charged in the Information. It must be recalled that the defendant's very full, complete and detailed statement concerning these crimes had been ruled admissible into evidence by the trial court prior to the beginning of the trial. Further, the State had in its possession vast amounts of other evidence to establish its case concerning material elements of the crimes charged. In any event, the evidence of these "other crimes" was certainly too remote in time and place to be relevant to the elements of intent, motive, plan and design. See, Glasser v. United States, 315 U.S. 60 (1942); Anderson v. United States, 170 U.S. 481 (1898). This is especially true in that all of the alleged crimes occurred subsequent to those at issue in the trial and illustrated a total lack of legal or factual connection with them. To suggest these subsequent acts tended to establish these elements borders on delusion. See, United States v. Daniels, 572 F.2d 535 (5th Cir. 1978); United States v. Weir, 575 F.2d 668 (8th Cir. 1978); United States v. Westlo, 576 F.2d 285 (10th Cir. 1978); United States v. Robinson, 544 F.2d 611 (2nd Cir. 1976); United States v. Beechum, 582 F.2d 898 (5th Cir. 1978); United States v. Manafzadeh, 592 F.2d 81 (2nd Cir. 1979); United States v. Mann, 590 F.2d 361 (1st Cir. 1978); United States v. Boyd, 595 F.2d 120 (3rd Cir. 1979); United States v. Phillips, 599 F.2d 134 (6th Cir. 1979); United States v. Bronco, 597 F.2d 1300 (9th Cir. 1979).

Finally, it is abundantly clear from the evidence that the use of evidence of other crimes was a thinly veiled attempt by the prosecution to garner a conviction of the defendant simply because he is a "bad man." Though the State argued throughout the trial that this evidence was relevant to show intent, motive, state of mind, plan and design, such arguments were merely a "smokescreen" used to give their real intentions concerning this evidence some form of legitimacy: that is, their implicit and explicit argument that such evidence shows that the defendant acted in conformity in committing, not only the crimes charged, but the crimes alleged to have been committed in the other states. Such evidence, for this purpose, is clearly inadmissible

under Nebraska statutory law and the Federal Rules of Evidence. See, Neb. Rev. Stat. § 27-404(2) (Reissue 1975). Even if one could argue that such evidence had some relevance and probative value, it still should have been excluded under the provisions of Neb. Rev. Stat. § 27-403 (Reissue 1975), in that "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." These specific objections were raised in both of the defendant's Motions in Limine as well as at trial (T166; 168). Yet, as the record reflects, all of these objections were overruled (T316; T317). The end result of these rulings was that the State spent a majority of the trial presenting evidence of other crimes. The evidence was so vast and substantial as to effectively deny the defendant his right to a fair and impartial trial. As is too often the case, once evidence of "other crimes" is presented to a jury a "guilty outcome (is) a mere formality." See, United States v. Burkhart, 458 F.2d 201, 204 (10th Cir. 1972).

III.

THE TRIAL COURT'S REFUSAL TO GIVE PETITIONER'S REQUESTED INSTRUCTIONS WITH REGARD TO THE POTENTIAL CONSEQUENCES OF AN ACQUITTAL BY REASON OF INSANITY, AND AN INSTRUCTION CONCERNING THE EFFECTS OF INTOXICATION ON THE DEFENDANT'S ABILITY TO FORM THE REQUIRED INTENT, VIOLATED PETITIONER'S RIGHTS TO A FAIR TRIAL AND DUE PROCESS OF LAW AS GUARANTEED BY THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION. FURTHER, THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE THE SPLIT AMONG JURISDICTIONS CONCERNING THE GIVING OF AN INSTRUCTION THAT SETS OUT THE POTENTIAL CONSEQUENCES OF A VERDICT OF NOT GUILTY BY REASON OF INSANITY.

Prior to the end of the trial in this case, counsel submitted written requests for specific instructions to the Court. These requests were timely and in proper form. They dealt with issues that were not covered by the trial Court's proposed instructions. Two of the instructions concerned the consequences of a finding of not guilty by reason of insanity relative to the defendant's potential commitment to a mental institution as a result of such finding (T218; T220)

Appendix J and K. The other instruction concerned the subject of intoxication as it relates to the Defendant's ability to act purposely, deliberately and with premeditation before the doing of the acts charged. In essence, this instruction was directed at the issue of the effect of intoxication on a person's ability to form the specific intent charged in the information (T219) Appendix L. With all parties present, argument was held in the trial Court's chambers. At the conclusion of the argument, the Court refused all three instructions (T218; T219; T220). Though these three instructions accurately stated the relevant law and were supported by evidence adduced at the trial, the Court not only refused to give these instructions but refused to cover the subject matter in any other instructions (T221). The ultimate result of the Court's actions in this regard was to deny the Defendant due process of law and equal protection of the law in that he was not allowed to present his theory of the case to the jury, even though the theory was supported by evidence adduced at the trial.

The general principles of law concerning a defendant's right to particular instructions is well established. One of the basic tenets of the law in this area is that a requested instruction that is supported by any evidence must be given if it accurately states the law and is not adequately covered by other instructions. See, Thorwegan v. King, 111 U.S. 549 (1884); State v. Chaney, 184 Neb. 734, 171 N.W.2d 787 (1969); Pierce v. State, 173 Neb. 319, 113 N.W.2d 333 (1962); Washington v. State, 160 Neb. 385, 70 N.W.2d 378 (1955); State v. Stewart, 197 Neb. 497, 250 N.W.2d 849 (1977). If the conditions mentioned above are present, and the instruction is warranted by the evidence, a refusal to give such an instruction is presumptively prejudicial to the defendant. This is a well established principles of due process of law. See, Ranney v. Barlow, 112 U.S. 207 (1884); Ayers v. Watson, 113 U.S. 594 (1885); Clement v. Parker, 125 U.S. 309 (1888); Stevenson v. United States, 162 U.S. 313 (1896); Bird v. United States, 180 U.S. 356 (1901); State v. Stewart, 197 Neb. 497, 250 N.W.2d 849 (1977). These principles of law have been specifically applied to requested instructions concerning the effects of intoxication on a defendant's ability to form a requisite intent when charged

with a specific intent crime. See, Hopt v. Utah, 104 U.S. 631 (1882); King v. United States, 372 F.2d 383 (D.C. Cir. 1967); Pierce v. Turner, 402 F.2d 109, cert. den., 394 U.S. 950 (10th Cir. 1968); Taylor v. State, 86 Neb. 795, 126 N.W. 752 (1910); Kraus v. State, 102 Neb. 690, 169 N.W. 3 (1918); Tvrz v. State, 154 Neb. 641, 48 N.W.2d 761 (1951). After considering the evidence adduced at trial, and the Court's final set of instructions, it is evidence that these instructions should have been given in that the requests were supported by all of the requisite facts. As previously noted, there was little question that the evidence clearly indicated that the defendant had been drinking alcoholic beverages prior to and after these acts were committed. This fact is clearly verified by the testimony at trial as well as statements found in the police reports included in Appendix M. Finally, it goes without saying that the Defendant's mental condition was at issue and a massive amount of evidence was adduced at trial concerning this subject. Since the theory of defense rested entirely on the issue of the Defendant's mental condition at the time these acts were committed, it is clear that his right to present his theory of the case to the jury was denied.

The principles of law alluded to above are clearly applicable to the issue of informing the jury of the potential consequences of an acquittal by reason of insanity. This is especially relevant when one recalls the fact that the jury received a detailed instruction on the insanity defense. However, there is a split among the federal and state jurisdictions concerning the question of the court's responsibility to give such an instruction in a case such as the one at bar.

The landmark case establishing the rationale and need for an instruction concerning the potential consequences of an acquittal by reason of insanity is Lyle v. United States, 103 App. D.C. 22, 254 F.2d 725, cert. den., 356 U.S. 961, cert. den., 362 U.S. 943, cert. den., 368 U.S. 992 (1957). In this case, the Court held that when a defendant proffers such an instruction and it is supported by the evidence, it was reversible error not to give the instruction. The excerpt from the case clearly sets out the basic rationale underlying what has become known as the "Lyle Doctrine:"

> This point arises under the doctrine, well established and sound, that the jury has no concern with the consequences of a verdict, either in the sentence, if any, or the nature or extent of it, or in probation. But we think that doctrine does not apply in the problem before us. The issue of insanity having been fairly raised, the jury may return one of three verdicts, guilty, not guilty, or not guilty by reason of insanity. Jurors, in common with people in general, are aware of the meaning of verdicts of guilty and not guilty: It is common knowledge that a verdict of not guilty means that the prisoner goes free and that a verdict of guilty means that he is subject to such punishment as the court may impose. But a verdict of not guilty by reason of insantiy has no such commonly understood meaning. . . . neither freedom nor punishment . . . we the jury has a right to know the meaning of this possible verdict as accurately as it knows by common knowledge the meaning of the other two possible verdicts. at 254 F.2d 728.

It is clear that the court's reasoning is based upon common sense and a realistic perception of human nature. Such an instruction helps guarantee that the verdict rendered by a jury in a criminal case, especially a case that naturally arouses passions and concern for one's safety, will be the product of reasoned deliberation and not impassioned emotions. To argue otherwise is to deny basic tenets of human nature.

The most important and relevant application of the "Lyle Doctrine" may very well be in capital cases where the death penalty is a possibility. In the past, this Court has invalidated procedural rules in capital cases that tended to guarantee that the death penalty is not imposed on the basis of "caprice or emotion." See, Lockett v. Ohio, 438 U.S. 586 (1978) and Gardner v. Florida, 430 U.S. 349 (1977). By applying the "Lyle Doctrine," the reliability of the determination of guilt would be increased. By not informing a jury of the consequences of this verdict, the jurors are left to speculate on its potential effect. In essence, the jury's attention is diverted from the key issue, that is, whether the defendant is guilty or innocent, and, instead, allows them to inject their concern for personal and public safety into the deliberations concerning the determination of guilt or innocence. As a practical matter, in such cases, these fears may encourage the jury to convict a defendant simply because they are afriad of him. It would encourage them to set aside the instructions

and render their verdict based upon fear, emotion and prejudice. However, the jury's ignorance of the consequences of this verdict might lead to the other extreme. That is, that no matter what the defendant may have done, regardless of the evidence presented, he may not be perceived as deserving a penalty of death. In either case, the effect of speculating on the consequences of such a verdict completely undercuts the rule of law and injects, instead, significant speculation, uncertainty and unreliability in the fact finding process. This cannot be tolerated in our criminal justice system, especially when the life of a human being is at stake.

This is an issue of first impression in the State of Nebraska. In research it, it is clear that there is a substantial split of opinion among both federal and state jurisdictions concerning this issue. One may speculate that this split of opinion was one of the underlying reasons for the trial court's refusal to give such an instruction. The consequences to the Defendant were devastating. He was placed in a position where, though the instruction accurately stated the relevant law involved and was supported by clear and convincing evidence, there were no pattern Nebraska Jury Instructions to turn to. Thus, the determination of his guilt or innocence was left open to the fears, prejudices and passions of the jury. As a result, he is sentenced to die. In a system supposedly based upon due process and equal protection of law, this cannot be tolerated. Thus, the Petitioner prays that this Court grants certiorari to resolve this issue.

IV.

THE TWO CONSECUTIVE SENTENCES OF DEATH IMPOSED UPON PETITIONER CONSTITUTE CRUEL AND UNUSUAL PUNISHMENT IN THAT THEY ARE DISPROPORTIONATELY SEVERE AND CRUEL AS APPLIED TO THE PETITIONER WHO, AS INDICATED BY THE CLEAR WEIGHT OF THE EVIDENCE, COMMITTED THESE ACTS UNDER EXTREME EMOTIONAL AND PSYCHOLOGICAL INSTABILITY AND DIMINISHED MENTAL CAPACITY, THUS VIOLATING HIS RIGHTS AND PRIVILEGES AS GUARANTEED BY THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

When considering whether a form of punishment is cruel and unusual the Court, has in the past, looked at contemporary social values as well as the personal characteristics of the individual defendant and

the facts surrounding the crime that garnered him the death penalty. In the case at bar, we are dealing with a defendant who has a verified history of extreme emotional and psychological disturbances. Due to these facts, sentencing the Petitioner to death amounts to the most cruel and unusual of punishments within our society.

It must be noted that the trial court, as well as the Nebraska Supreme Court in its statutory review of the sentence, gave only a passing evaluation of the Petitioner's psychological and emotional makeup at the time the acts were committed. This, of course, was the response even though the trial adduced vast amounts of evidence confirming Petitioner's mental disability. In fact, even the state's psychiatrists agreed that Petitioner was and presently continues to be mentally ill. The only difference of opinion was as to the degree of that illness. With these facts in mind, it is unbelievable that neither one of these courts considered them as mitigating Petitioner's responsibility for the acts. By their actions, these courts are saying that the Petitioner must die even though he was mentally disabled at the time the acts were committed. If this fact, standing alone, does not represent "cruel and unusual punishment" then this concept has no practical meaning under our Constitution and our society's moral values.

Further, under the facts of this case, the imposition of the death penalty is clearly disproportionate to both the underlying facts of the case as well as to the nature of penalty that might be necessary to achieve any proper and recognized purposes of punishment. See, Weems v. United States, 217 U.S. 349, 367 (1910). There was nothing to distinguish this heinous crime from those committed by other individuals who have been convicted of first degree murder in Nebraska but who did not receive the death penalty. Further, what legitimate social aim or purpose does the imposition of the death penalty serve? Its only function is to extinguish another human life. Is this a necessary or proper form of punishment? Does this most severe form of punishment serve any other purpose than to appease certain members of our society's blood - lust? The history of our society mandates that this final question must be answered in the negative.

The disproportionate nature of the sentence in this case is made apparent when one considers the methods and procedures used in administering it. It is absurd to believe, as Chief Justice Krivosha clearly pointed out in his dissent, that the sentence was a product of capricious discretion in both the trial and review in court. Further, it is Petitioner's belief that his sentence, along with a number of other ones meted out in the past few years, reflects racial prejudice. No white man or black man has ever been sentenced to death in Nebraska for causing the death of a black woman. However, the Petitioner and other members on death row who are also Black have been sentenced to death for the killing of a white woman. Since the death penalty in Nebraska is imposed so infrequently in relation to the number of homicides committed it makes one wonder why the members of death row in Nebraska, including the Petitioner, are more often black men than white in proportion to their race in the population of the State of Nebraska. This is simply one example of how Petitioner's sentence can legitimately be described as cruel and unusual in relation to how it was imposed and administered. See, Furman v. Georgia, 408 U.S. 238, 239-40, 309-10 (1972). Petitioner further contends that his sentence was, in part, a response to the strong and impassioned public opinion generated by the case in the relatively homogeneous and tight-knit community of Lincoln, Nebraska. As noted in the record, and in the opinion of the Nebraska Supreme Court, this case generated massive pre-trial publicity. The extent of this publicity can be easily verified by examining the large number or exhibits that were introduced into evidence in the hearing for a change of venue. Though numerous homicides had been committed in the Lincoln, Nebraska, area over the few years preceding and following Petitioner's conviction, his was the only one that generated a public outcry for his death. Petitioner's attorney defended most of these individuals. It is interesting to note that the facts of the cases were often similar except for the fact that all of the perpetrators and victims were white. One might suggest that, at least in Nebraska, there is a direct link between the racial makeup of the perpetrator and victim and the severity of sentence that is meted out. All one has to do to examine this hypothesis is to review the history of the criminal

justice system in the southern part and midwestern section of the United States. The truth and validity of it is simply a face of life that our legal and social systems do not want to recognize and deal with.

In conclusion, the facts surrounding this case clearly indicate that Petitioner's two, consecutive sentences of death were imposed as a product of inflamed and impassioned public opinion and a desire for revenge and retribution. If this were not the case then there were certainly other less severe forms of punishment that were available to the Court that would have served the ends of justice. One of the tragedies of this case is that the Petitioner is still suffering from the same forms of emotional and psychological disability that contributed to his acts. Petitioner's attorney has has close contact with him over the past few years concerning the progress of his case. On those occasions where the communication was verbal or written it was extremely evident that the state, if and when they do execute him, will be killing a man who is still gripped in the grasp of severe mental impairment. If this does not outrage public morality then our society has regressed much further into barbarity than Petitioner's attorney believes.

V.

THE PROCEDURES AND STATUTES USED TO IMPOSE THE DEATH PENALTY IN THIS CASE ARE SO BROAD, VAGUE AND DISCRIMINATORY AS TO VIOLATE PETITIONER'S RIGHTS GUARANTEED BY THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

In the State of Nebraska, once a person is convicted of murder in the first degree he is then set for sentencing before a three-judge panel. It is this panel that makes the soul and final determination, at that stage of the proceedings, on whether an individual will receive life imprisonment or will die in the electric chair. The jury that heard all of the evidence have absolutely no input into the sentencing process. Thus, the life of the defendant is placed in the hands of the trial judge, along with two other judges that have no personal knowledge of the evidence in the case. Under this sentencing scheme a defendant is completely deprived of his right to be judged by a group of his peers.

This denial of input into the sentencing process by the jury of peers that heard all the evidence in the case is constitutionally defective under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution. First, it violates principles very basic to American jurisprudence. The likelihood of arbitrary action by twelve jurors and a judge is much less probable than such action by three judges who are the representatives, in essence of the State. Judges, in almost all cases, come from an entirely different and often conflicting background, both socially and economically than that of the person who must be sentenced by them. This is more often than not the case in a jury made up of twelve people of various backgrounds. Where judges may harbor and reflect very limited views of contemporary morals and concepts of social justice, a jury is more likely to have a more balanced view on the realistic perceptions held by society in general as to punishment. This is especially true when one considers that all three of the sentencing judges were white and Mr. Williams, the Petitioner, is black. Two of the sentencing judges were from another jurisdiction. Therefore, whatever their judgment, they did not have to go back into the community from which this case originated. This would not be the case for the jurors who would have to go back into the community and live with their judgment. One might argue that it is easier to sentence an individual to death when that person is not from the same community as the condemned person. Jurors, on the other hand, might arguably consider this issue more carefully knowing that they have to go back into the community and live among their friends and the condemned person's neighbors. Under Nebraska state statute, the probability of the arbitrary imposition of the death penalty is built into the system. In this regard, our history teaches us that it is always easier to kill someone or a group of people that the actor does not know or identify with. The three judges who sentenced the Petitioner proved the validity of this perception.

Finally, Petitioner was denied his right to trial by jury in that the jury was never allowed to consider or pass on the various mitigating and aggravating circumstances set out in the relevant statute. The jury, as finders of fact, should have been given the

opportunity to pass on the underlying facts going to these issues. After all, they were present when all of the evidence was presented. Two of the three sentencing judges were not. Therefore, which group is better able to make findings of fact concerning these issues? It goes without saying that the jury was clearly in a better position to pass judgment in this area. However, the Nebraska statutes clearly do not allow for this. Therefore, due to the substantial practical significance of having a jury pass on these issues, Petitioner was denied his right to trial by jury and due process of law by the Nebraska statutory scheme.

One of the most glaring defects in the Nebraska statutory scheme may be found in the overbroad and vague language used in the statutes relating to the sentencing stage of a first degree murder prosecution. The language used in these statutes are so vague and overbroad as to clearly violate the Eighth and Fourteenth Amendments to the United States Constitution. By simply referring to the language of these statutes, this contention will become abundantly clear.

The three statutes on which the sentences are based are Sections 29-2519, 29-2521, 29-2522 and 29-2523. These are specifically referred to in the trial court's Order on sentencing and commitment. See, Appendix O. Section 29-2519 simply states the Nebraska legislators intent concerning mandatory standards for the imposition of the sentence of death. It limits the imposition of this sentence to the various forms of first degree murder found in Section 28-401. From a fair reading of the statute, it appears that it was the legislators intent to establish some form of "balancing test" in setting this standard for imposition. However, it sets out no specifics, thus, sets no standard at all. It is interesting to note that, as will be discussed shortly, the standard for review used by the Nebraska Supreme Court was that found in the amended version of this statute (Neb. Rev. Stat. § 29-2519 (Cum. Supp. 1978)), that refers to definitions relating to homicide that did not come into force until well after a year these acts were committed.

Section 29-2520 simply sets out the procedure for the appointment of the sentencing panel. It is Section 29-2522 that must be considered when one looks to consider what standard has been set by the Legislature

to limit the trial court's discretion in imposing a sentence of death. The statute sets out two considerations that must be used in sentencing a defendant to life imprisonment or death:

> (1) Whether sufficient aggravating circumstances exist to justify imposition of a sentence of death; or
> (2) Whether sufficient mitigating circumstances exist which approach or exceed the weight given to the aggravating circumstances.

Any rational reading of these considerations must lead one to the conclusion that it sets out no definable standard by which the sentence of death may be imposed when the statute is applied. It does not refer to any specific balancing test that can, with any specificity, be applied. It certainly does not set out any mathematical formula for the application of the statute. Consequently, it completely fails to adequate limit or channel the sentencing court's discretion. Further, the considerations in terms are so vague and overbroad that their application rests on a totally subjective standard that may be arrived at by the sentencing court. This type of vague and open-ended construction is of the same nature that this Honorable Court was not willing to uphold in the case of Gregg v. Virginia, 428 U.S. 153, 207 (1976), when it mandated that sentencing discretion must be circumscribed by legislative guidelines. See, also, Furman v. Georgia, 408 U.S. 238 (1972); Woodson v. North Carolina, 428 U.S. 280, 303 (1976).

In essence this statute gives a license to the sentencing panel to create its own standard, on a case-by-case basis. It allows for a sweeping and improper application with no limits on its arbitrary and discriminatory enforcement. See, Herndon v. Lowry, 301 U.S. 242, 263 (1937); NAACP v. Bruton, 371 U.S. 415, 433 (1963); Smith v. Goguen, 415 U.S. 566, 572-573 (1974). Though Petitioner is certain that this was not the intended affect of this legislation, however, the result of its application is clearly constitutionally defective.

The most blatantly overbroad and vague provisions in Nebraska's death penalty sentencing scheme are found § 29-2523. This is the statute that sets out the aggravating and mitigating circumstances to be considered by the sentencing panel. The sentencing court specifically refers to these circumstances in its Order of sentence and commitment found in Appendix O. The Court begins its specific

consideration of these matters on page 3. However, before they get to that, they state in paragraph 5 that:

> That the Court has not considered the evidence of the crimes alleged to have been committed by the defendant subsequent to the crimes charged in the information, in any of the statutory aggravating circumstances herein, except as the same may relate to the intent, sanity, motive or absence of mistake or accident in the particular acts charged.

Thus, from the beginning of their consideration, the sentencing panel is denying the Defendant his constitutional rights to confrontation, due process of law and equal protection of law by considering matters that have never been adjudicated. Petitioner contends that these constitutional violations are so blatant as to not require any extended comment.

The first aggravating circumstance considered is whether the:

> Offender was previously convicted of another murder or a crime involving the use or threat of violence to the person, or has a substantial history of serious assaultive or terrorizing criminal activity;

It is clear that this aggravating circumstance is phrased in the alternative. That is, it appears that any of the three possible factual situations would support that this aggravating circumstance is present. However, this fair reading of the statutory provision clearly suggests that it cannot be applied as an objective guide to channel and limit the sentencing panel's sentencing discretion. Further, what types of acts or offenses fall under the various categories? For example, if a Defendant, at one time in his life, had threatened to hit a belligerent drunk who was insulting his wife, would this qualify as a "crime involving the use or threat of violence to the person?" To qualify, must the crime be a felony? Or, is a "substantial history of serious assaultive or terrorizing criminal activity" comprised of two convictions? Or would it be five convictions? There is nothing in the language to give any guidance whatsoever in answering questions such as these. However, these are exactly the questions that the sentencing panel is called upon to answer. In finding that this aggravating circumstance existed in both counts, the panel relied upon a conviction of robbery in the third degree that occurred thirteen years prior to this offense as well as making reference to

some act that allegedly occurred on August 5, 1977, as further proof of the existence of "a substantial history of serious assaultive criminal activity." As can be confirmed in the Pre-Sentence Report in this case, the incident occurring on August 5, 1977, was never prosecuted. In fact, the alleged "victim" was responsible for having the matter dropped. The sentencing panel's findings in this regard very clearly show how this vague and overbroad statutory language is vulnerable to wanton, subjective discretion.

On page 5 of the Order, the sentencing panel finds that the two crimes charged were "especially heinous, atrocious, cruel and manifested exceptional depravity by ordinary standards of morality and intelligence." However, there is absolutely no facts stated other than evidence of a sexual assault on one of the victims to substantiate this finding. There is absolutely no way any person or groups of people can objectively define these terms. This is especially true when they are found to exist in relation to "ordinary standards of morality and intelligence." In essence, the sentencing panel simply applied their own "standards" and arrived at a subjective definition. Nowhere in the statutes or the common law of Nebraska are these terms defined. Thus, each and every defendant that comes before such a sentencing panel is at the complete mercy of that panel's personal, subjective standards of morality and intelligence. In the present case, I feel that this is verified in that the panel found that this circumstance applied to both of the killings, however, they only allude to an alleged sexual assault on only one of the victims. If this is the triggering mechanism for their findings, how can they find that the circumstance exists to the other victim who allegedly was not sexually assaulted? This provision is so violative of Petitioner's rights to due process and equal protection of the law as to shock the conscience of anyone who believes in the quality and fairness of the application of our laws.

Petitioner could go on and detail numerous other defects relating to the aggravating circumstances set out in this statute. However, it might be more profitable to move on to the section dealing with mitigating circumstances. On page 6 of the Order, for example, the panel found that "the Defendant has a significant and extensive

history of prior criminal activity." Again, what is the standard or guidelines at arriving at this conclusion? What is the difference between an insignificant and a "significant and extensive" history of prior criminal activity? Again, there is only one answer to cover these questions: That is, each and every member of a sentencing panel is free and unrestrained in interpreting and applying this language.

The panel goes on, in subsection "c" on page 7 to find that the mitigating circumstance of the crime being committed while being under the influence of extreme mental or emotional disturbance was not present. It flatly states that "the court finds that the Defendant was under the influence of emotional disturbance but not to an extreme degree required by this statutory standard." This finding is in complete and direct contradiction with the testimony of the doctors that testified for both sides during the trial. Further, if this degree of emotional disturbance had not been present, then why did the court find reason, supported by the evidence, to read to the jury an instruction on the insanity defense? Further, this finding is in conflict with their subsequent finding in subsection "g" where they found that he suffered from an anti-social personality disorder, was intoxicated with alcohol and drugs and was otherwise emotionally disturbed at the time these acts were committed. See, Appendix O, pages 8-9. In fact, they find that this condition did diminish his capacity to conform his conduct to the requirements of the law but not to the extent as to excuse him from the legal consequences of his act. In arriving at this, what standard did they use. If the court looks at the provisions of this statute, there is absolutely no mention of any standard or criteria for arriving at this conclusion. However, again, it is clear that the sentencing panel invented their own standard. For example, they support their finding by the observation that "he had the ability to assist his counsel in his own defense." How, can any reasonable person suggest that there is a relationship between a defendant's condition at time of trial and <u>any</u> relation to his state of mind at the time of the commission of an act where the intervening period of time is almost one year? Such a fete is impossible for a reasonable person.

By now it should be abundantly clear that the statutes used to

sentence Petitioner to two consecutive penalties of death are so subjective, overbroad and vague as to violate any reasonable concept of due process of law and equal protection of the law. In applying this Honorable Court's prior decisions to these facts, it is strongly contended that this is the only rational finding that may come forth.

Finally, Nebraska's statutory scheme setting out the procedures used for the determination of the sentence in a first degree murder case is constitutionally defective. Specifically, Petitioner is referring to the provisions of § 29-2521. In essence, this statute limits the matters to be considered in arriving at this decision to those set out as aggravating or mitigating circumstances in § 29-2523 and only those other matters that the Court "deems relevant" or "to have probative value." The only thing that the sentencing panel must include in this consideration are those factors set out in § 29-2523. They have absolute and unbridled discretion to include or exclude any other matters from the process. They are totally unrestrained in this regard. Consequently, matters that might be considered during the sentencing process of someone found guilty of, for example, second degree murder would, in effect, be excluded or included, at the whim of the members of the sentencing panel. When one considers the fact that a defendant may be sentenced to die under this procedure it should seem outrageous that every other convicted defendant receives more protection from the abuse of judicial discretion than those who have been sentenced to die in the electric chair. This cannot be tolerated in a system founded upon due process and equal protection of the law. This injustice is exacerbated by the fact that, under the provisions of this statute, the defendant or his counsel are not only limited in what matters they can present in mitigation of the sentence, but the burden shifts to them to come forward with evidence in this regard. In mandating that "the state and the defendant or his counsel shall be permitted to present argument for or against sentence of death," the Legislature has clearly directed that the responsibility for coming forward with evidence of mitigation rests with defendant or his counsel. In a statutory scheme that appears to have been constructed to violate or limit a

defendant's constitutional rights in the sentencing process this final legislative mandate acts as another, and often fatal, attack on the most basic concepts of due process and equal protection of the law. Taken as a whole, a defendant is left to the subjective whims of the sentencing panel. This may be acceptable in a totalitarian society but not under our Constitution.

VI.

THE STATUTES AND PROCEDURES RELATING TO THE NEBRASKA SUPREME COURT'S REVIEW OF DEATH PENALTY CASES ARE SO IMPERMISSIBLY OVERBROAD, VAGUE AND DISCRETIONARY AS TO VIOLATE PETITIONER'S RIGHTS TO DUE PROCESS OF LAW, THE EQUAL PROTECTION OF THE LAW AND THE PROTECTION FROM THE IMPOSITION OF CRUEL AND UNUSUAL PUNISHMENT AS GUARANTEED BY THE FIFTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

One of the chief holdings by this Honorable Court in the case of Gregg v. Georgia, 428 U.S. 153 (1976), was the requirement that all capital sentences receive a statutorily mandated mandatory review by the State Supreme Court to insure the equity and regularity in the sentencing process. This new requirement was characterized as "an important additional safeguard against arbitrariness and caprice." Id. at 198. In response to this holding, the Nebraska Legislature passed various statutes mandating such a mandatory review. The intent of the Legislature in passing these statutes is clearly reflected in the provisions of § 29-2521.01. These findings, along with the specific statutes implementing the Legislature's intent were contained in Legislative Bill 711 of the 58th Legislative Second Session. However, as the sentencing panel stated in their order of sentencing commitment, "this act is broad, vague and presents no definite guidelines for the court to follow." See, Appendix O. Their finding will be amply demonstrated with the discussion found below.

The opinion of the Nebraska Supreme Court is found as Exhibit A. They did not issue an opinion concerning the issues raised at rehearing. As one reads through the first two thirds of the majority's opinion, it is clear that the Court dealt, in a very superficial way, with all of the issues raised concerning pre-trial procedures and those stemming from the trial itself. To characterize this review as

superficial is accurate when one considers that this part of the opinion clearly shows a misunderstanding or ignorance of the evidence adduced at trial and the pre-trial hearings. For example, in the first full paragraph on page 27, the court found that the trial court's finding that "nothing in the exhibits appears to be materially at odds with the testimony given at the trial" is fully supported by the record. As argued earlier, all one would have to do is read the exhibits found in Appendix M to find that this conclusion cannot be supported by the record. They go on to conclude that there was no showing made that the information in the police reports could be used to impeach any witness in that the information in the police reports were not of any value in terms of being exculpatory or in mitigation of the degree of the offenses. Again, one simply has to read these reports to show that this in no way can be supported as a conclusion by any reasonable person. These were just a few examples of the majority's cursory and superficial examination of the record in the review process. Next, I would ask the Court to consider the Nebraska Supreme Court's review of the sentence in this case as well as the statutes applied in this process.

The majority's opinion concerning the sentence may be found to begin on page 28 of Appendix A. Their conclusion, of course, was that "the death sentence in the case now before us is not excessive or disproportionate to the death penalties imposed in the other death penalty cases." Pages 29-30. In support of this conclusion, they discuss the various mandatory review statutes used to support it.

They begin, on page 28, by referring to § 28-303, of the Nebraska Revised Statutes. This provision came into effect on January 1, 1979. It is first reported in the 1978 Cumulative Supplement of the Nebraska Revised Statutes. It reads as follows:

> Homicide; terms; defined. As used in §§ 28-302 to 28-306, unless the context otherwise requires:
>
> (1) Homicide shall mean the killing of a person by another;
>
> (2) Person, when referring to the victime of a homicide, shall mean a human being who had been born and was alive at the time of a homicidal act; and
>
> (3) Premeditation shall mean a design formed to do something before it is done.

This Court must keep in mind that the crimes Petitioner was convicted of were committed in August of 1977. The statutes referred to in § 29-2519 obviously cannot be applied to define a crime that was committed before their passage. To do so would be to apply an ex post facto law in this review process. Thus, the Petitioner's conviction for violation of Neb. Rev. Stat. § 28-401 (Reissue 1975), is obviously unconstitutional on its face. In essence, he received no review at all of his conviction under that specific statute. Since the Court found that the two statutes found in the 1978 Cumulative Supplement are "a primary foundation, basic to the review of the statutory provisions referred to" it is clear that the entire process used in the review of this case is unconstitutional and denied Petitioner his right to due process and equal protection of the law.

In fact, the Court's finding that the sentencing panel "complied fully with the statutory standards and specific procedures applicable to trial courts in cases of conviction for murder in the first degree" (Appendix A, page 28), is even erreneous. To support this conclusion, the Court specifically refers to the provisions of § 29-2521.01 that mandates that this analysis and review encompass "all criminal homicides committed under the existing law." In page 9 of this sentencing panel's order, it clearly states that this analysis was limited to "all homicide cases reported by the Nebraska Supreme Court since April 20, 1973." Thus, the sentencing panel arbitrarily set its scope of considerations to a limited number of reported cases, such scope of consideration clearly violating the language and intent of the relevant statutes. In fact, the Nebraska Supreme Court failed to follow the dictates of these statutes. This is verified by the comments of Chief Justice Krivosha in his dissent.

In the majority opinion, the Court justifies this limitation by interpreting "all criminal homicides" as relating exclusively to those of first degree murder. In justifying this, the Court reasoned that "to interpret that language of LB 711 literally would create insurmountable constitutional problems. In view of the disposition made here, it is unnecessary to discuss constitutional issues." Appendix A, page 29. In arriving at this conclusion, the majority clearly violated their prior opinions on this issue as well as the very basic

constitutional principles.

The principles of law concerning statutory interpretation are well established. When a statute limits a thing to be done in a particular mode, it necessarily excludes all other modes of interpretation and application. See, Service Life Insurance Co. v. United States, 293 F.2d 72 (8th Cir. 1961); In re Burden, 83 F.Supp. 416 (D.C. Neb. 1949); Bachus v. Swanson, 179 Neb. 1, 136 N.W.2d 189 (1965). Words and statutes must be given their plain or common meaning in interpreting them. See, Ray Price, Inc. v. United States, 297 F.Supp. 55 (D.C. Neb. 1969); Platte County v. New Amsterdam Casualty Co., 6 F.R.D. 475 (D.C. Neb. 1946); Weiss v. Union Insurance Co., 202 Neb. 469, 276 N.W.2d 88 (1979). This is especially true when a court is dealing with criminal and penal statutes. These statutes must be strictly construed. See, United States v. Tyndall, 400 F.Supp. 949 (D.C. Neb. 1975); State v. Nance, 197 Neb. 257, 248 N.W.2d 339 (1976). Courts are not at liberty to change the plain meaning of words in such statutes. See, City of Lincoln, Nebraska v. Ricketts, 297 U.S. 373 (1936); Anderson v. Cronkleton, 32 F.2d 170 (8th Cir. 1929); State v. Coleman, 189 Neb. 725, 204 N.W.2d 787 (1973). Further, courts cannot extend or modify the meaning of words or statutes. See, Baker v. United States, 460 F.2d 827 (8th Cir. 1972); United States v. Omar, Inc., 91 F.Supp. 121 (D.C. Neb. 1950); State v. Tatreau, 176 Neb. 381, 126 N.W.2d 157 (1964). If a statute or a meaning of a word is, in fact, ambiguous in its meaning or application, it must be construed most favorably to the accused. See, United States v. Bass, 404 U.S. 336, 347 (1971); Ladner v. United States, 358 U.S. 169, 178 (1958); State v. Lauritsen, 178 Neb. 230, 132 N.W.2d 379 (1965). All of these concepts stem from principles of due process and equal protection. They should receive their most stringent application when one's life is at stake. There right to life is so fundamental as to be given the utmost protection from its unreasonable or unlawful taking by the due process requirements found in the Fifth and Fourteenth Amendments to the United States Constitution. See, Yates v. United States, 356 U.S. 363 (1958); Landrum v. Moats, 576 F.2d 1320, cert. denied, 99 S.Ct. 282 (1978); Inmates of Nebraska Penal and Correctional Complex v. Greenholtz, 576 N.W.2d 1274, cert. granted, 99 S.Ct. 76 (1978);

State v. Bevins, 198 Neb. 761, 255 N.W.2d 284 (1977). All of these principles of law are directly relevant in that there is no ambiguity as to the meaning of "criminal homicide" under Nebraska law. See, Starkweather v. State, 167 Neb. 477, 93 N.W.2d 619 (1958) - first degree murder as homicide under § 28-401; Woodard v. State, 159 Neb. 603, 68 N.W.2d 166 (1955) - second degree murder as homicide under § 28-402; State v. Beers, 201 Neb. 714, 271 N.W.2d 842 (1978) - voluntary manslaughter as homicide under § 28-403. Under Nebraska law, all of these then are the various forms of "criminal homicide." There is absolutely nothing ambiguous about their definition. Though the Nebraska Supreme Court would like to avoid the inconvenience of applying the relevant statutes as written, there is absolutely no excuse for not doing to. In not doing so, they have committed the most blatant form of due process and equal protection violations that has been exhibited in recent years.

Even assuming that the Nebraska Supreme Court, as well as the sentencing panel, had reviewed each and every "criminal homicide case" since April of 1973 the review, itself, still would be constitutionally defective. One of the basic constitutional flaws stems from the lack of a uniform standard of consideration concerning who receives a penalty of life imprisonment and who must die for his crime. For example, in § 29-2522 the District Court is directed to impose life imprisonment if "sufficient mitigating circumstances exist which approach or exceed the weight given to the aggravating circumstances." Obviously, this is no standard at all. On the other hand, under the provisions of § 29-2521.03, the Nebraska Supreme Court is directed that "no sentence imposed shall be greater than those imposed in other cases with same or similar circumstances." Again, this is so ambiguous that no uniform or definable standard can be set. Even if both of these separate directives could be defined as a uniform standard for consideration and review, they would still be in direct conflict with each other. In essence, both judicial bodies are supposed to pass on the same issue (i.e., what sentence is appropriate) however, each, according to various statutes, are mandated to use different "tests" to arrive at their conclusions. This is not only a lack of consistency, but violates Petitioner's rights to the equal protection of the law.

This absurdity would be comical if one's life was not at stake.

Chief Justice Krivosha pointed out many of these problems in his dissent. He addresses many of the problems that I have just spoken to, concerning a "uniform test," on page 32 of the official opinion. On page 33 of his dissent, the Chief Justice also concludes that the sentencing panel must apply the same test as that applied by the Nebraska Supreme Court in its mandatory review process. I sympathize with him when he states that "I'm simply unable to make such fine distinctions with regard to, on the one hand, the matter of killing, and on the other hand, the imposition of the death penalty." At Appendix A, page 35. It is contended that this is especially true when one considers the very limited scope of the aggravating and mitigating circumstances that the sentencing panel is allowed to consider in making the initial determination on this issue. This is where the consideration of "fine distinctions" begins. For example, the statute setting the scope of what aggravating and mitigating circumstances may be considered (§ 29-2523) does not allow for the consideration of the following:

1. The massive amounts of evidence verifying Petitioner's history of being a psychologically and physically abused, neglected and impoverished child.

2. Evidence concerning lack of potential for similar acts in the future.

3. Evidence concerning lack of present dangerousness.

4. Evidence of prior, ongoing attempts to deal with Petitioner's mental problems.

5. Lack of consideration of evidence going to potential for rehabilitation.

6. Lack of consideration of evidence of strong religious and moral background.

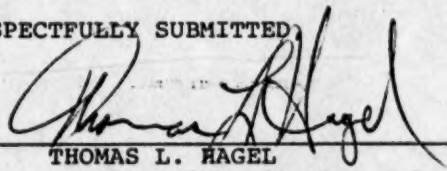
These are just some of the examples one might consider in making "fine distinctions" in the sentencing process. Under the present statutory scheme, such fine distinctions cannot be made rationally. In reality, the imposition of the death penalty is still totally a matter of absolute discretion. This fact is beautifully stated in Chief Justice Krivosha's conclusion when he said that "I believe I will recognize an appropriate case when I see it." This comment definitively characterizes the entire process by which the death penalty is imposed in

the State of Nebraska. When the life of another human being is vulnerable to such whimsical thinking and actions, then our Constitution has, in reality, no meaning. We, as a society, might as well go back and dwell in the caves and jungles of our barbarous ancestors.

CONCLUSION

The Petitioner respectfully prays that this Honorable Court will grant his Petition for Certiorari for all of the reasons listed above.

RESPECTFULLY SUBMITTED,

By 

THOMAS L. HAGEL
Temple University Law School
Philadelphia, Pennsylvania 19122
RICHARD L. GOOS
Office of the Public Defender
555 South 10th Street
Lincoln, Nebraska 68508
Of Counsel
Attorneys for Petitioner

MOTION FOR LEAVE TO FILE OUT OF TIME PETITION

Petitioner respectfully moves for leave to file this Petition for Writ of Certiorari out-of-time. Said Petition was supposed to have been filed on or before July 14, 1980. Said Petition was not filed on time due to the following facts:

1. That Petitioner's attorney, Thomas L. Hagel, has missed a number of work days in the recent past due to fatigue and pneumonia.

2. Petitioner's attorney was assigned the researching and writing of this brief even though his regularly scheduled felony caseload still exceeded the maximum number set by a study of the National College of Criminal Defense Lawyers and Public Defenders.

3. Petitioner's attorney has made every diligent effort to have this Petition filed on time.

4. The lack of resources and support staff in the office of the Public Defender precluded Petitioner's attorney from concluding and filing this brief on time.

Petitioner further prays that this Honorable Court exercise its authority and discretion under Rule 22(1) of the Rules of the Supreme Court and allow this Petition to be accepted. It is hoped that this Honorable Court will do so in that it will serve the ends of justice and stay the execution of Petitioner. See, Woodson v. North Carolina,

228 U.S. 280 (1976); Schacht v. United States, 398 U.S. 58, 63-64 (1970); Taglianetti v. United States, 394 U.S. 316, n. 1 (1969); Arnold v. North Carolina, 376 U.S. 773 (1964).

RESPECTFULLY SUBMITTED,

By _____

THOMAS L. HAGEL
Temple University Law School
Philadelphia, Pennsylvania 19122
RICHARD L. GOOS
Office of the Public Defender
555 South 10th Street
Lincoln, Nebraska 68508
Of Counsel
Attorneys for Petitioner

CERTIFICATE OF SERVICE

We hereby certify we are counsel for the Petitioner in the above-named case and that prior to filing the within Petition for Certiorari, we have served true and correct copies of said Petitioner for Certiorari by mailing to Chief Justice Norman Krivosha, Chief Justice of the Nebraska Supreme Court, State Capitol Building, Lincoln, Nebraska 68509; Mr. Paul L. Douglas, Attorney General for the State of Nebraska, State Capitol Building, Lincoln, Nebraska 68509; and Ms. Judy K. Hoffman, Assistant Attorney General for the State of Nebraska, State Capitol Building, Lincoln, Nebraska 68509, in properly addressed envelopes with sufficient postage thereon. Said true and correct copies were mailed on the 22nd day of July, 1980.

DATED: This 22nd day of July, 1980.

_____

THOMAS L. HAGEL
Temple University Law School
Philadelphia, Pennsylvania 19122
RICHARD L. GOOS
Office of the Public Defender
555 South 10th Street
Lincoln, Nebraska 68508
Of Counsel
Attorneys for Petitioner

205 Neb. 56

STATE of Nebraska, Appellee,

v.

Robert E. WILLIAMS, Appellant.

No. 42235.

Supreme Court of Nebraska.

Dec. 18, 1979.

Defendant was convicted in the District Court, Lancaster County, Herbert A. Ronin, J., of two counts of murder in the first degree and one count of first-degree sexual assault and was sentenced to death, and he appealed. The Supreme Court, McCown, J., held that: (1) evidence of other crimes committed by defendant following charged crimes was admissible; (2) photographs of crime scenes were relevant and of direct probative value in establishing various elements of crimes charged; (3) record supported action of trial court in denying motion for change of venue; (4) statements, admissions, and comments obtained from defendant by law enforcement officers were not subject to suppression; (5) defendant was not denied fair trial and due process on ground of alleged misconduct in State's withholding evidence; (6) it was not error to refuse to instruct on consequences of verdict of not guilty by reason of insanity; (7) prima facie case was made as to first-degree sexual assault count; and (8) sentence of death was not excessive relative to facts of case under applicable statutory considerations.

Affirmed.

Krivosha, C. J., concurred in part and dissented in part and filed opinion.

1. Criminal Law ⇐369.15

In sexual assault cases, evidence which tends to show a course of conduct, scheme, or design is admissible to prove identity, although such evidence relates to other offenses. R.R.S.1943, § 27-404(2).

2. Criminal Law ⇐369.2(1)

Evidence of other crimes may be admitted in criminal prosecution where evidence is so related to time, place, and circumstances to offense or offenses charged as to give substantial probative value in determining guilt of accused. R.R.S.1943, § 27-404(2).

3. Criminal Law ⇐369.2(1)

Question of probative value of other crimes evidence depends upon many considerations, including proximity and point of time and place, character of evidence, and all surrounding circumstances. R.R.S.1943, § 27-404(2).

4. Criminal Law ⇐369.2(1, 2)

Evidence of other criminal acts which involve or explain circumstances of crime charged, or are integral parts of overall occurrence or transaction, may be admissible. R.R.S.1943, § 27-404(2).

5. Criminal Law ⇐371(4, 9, 12), 372(4, 7)

Evidence of other crimes committed by defendant following charged murders and sexual assault was admissible not only as evidence relevant on issue of motive and intent, but to establish plan, preparation, and method of operation. R.R.S.1943, § 27-404(2).

6. Criminal Law ⇐438(7)

Admission of photographs of gruesome nature rests largely within sound discretion of trial court, which must determine their relevancy and weigh their probative value against their possible prejudicial effect.

7. Criminal Law ⇐438(6)

Although probative value of gruesome photographs should be weighed against possible prejudicial effect before they are admitted, if photograph illustrates or makes clear some controverted issue in homicide case, a proper foundation having been laid, it may be received, even if it is gruesome.

8. Criminal Law ⇐438(6)

In homicide case, photographs of victim, upon proper foundation, may be received in evidence for purposes of identification, to show condition of body, nature

and extent of wounds or injuries, and to establish malice or intent.

9. Criminal Law ⇐438(4, 5)

In prosecution for murder in the first degree and first-degree sexual assault, photographs of crime scenes and victim were relevant and of direct probative value in establishing various elements of crimes charged and were admissible.

10. Criminal Law ⇐134(1)

Burden of showing essential unfairness must be sustained by one who claims such injustice and seeks to have the result set aside.

11. Criminal Law ⇐121, 1150

Motion for change of venue in criminal case is addressed to sound discretion of trial court and its ruling will not be disturbed on appeal unless clear abuse of discretion is shown.

12. Criminal Law ⇐134(4)

While there was extensive pretrial publicity in case, record supported action of trial court in denying motion for change of venue.

13. Criminal Law ⇐414, 532

Admission of evidence of a statement or confession constitutes trial court's independent determination that statement was voluntarily made.

14. Criminal Law ⇐1158(4)

Finding by trial court that statement of accused is voluntary will not ordinarily be set aside on appeal unless finding is clearly erroneous.

15. Criminal Law ⇐414

Although *Miranda* rights were not included on tape recording of defendant's statement and defendant testified that *Miranda* rights were never read to him and that he requested presence of attorney, testimony of two police officers that *Miranda* warnings were given to defendant before statement was made and testimony as to why tape recorder was not turned on at outset of interrogation supported trial court's finding of voluntariness.

16. Constitutional Law ⇐268(5)
Criminal Law ⇐627.8(6)

Defendant was not denied fair trial and due process because of State's alleged misconduct in withholding evidence favorable to defendant in violation of trial court's discovery and disclosure order. U.S.C.A. Const. Amends. 5, 14.

17. Criminal Law ⇐627.8(6)

Even though defendant has made general motion for discovery and disclosure which has been granted in the sense that it covers documents of whatsoever kind or nature which could be used as evidence by state, state is not necessarily required to produce for defendant anything which might aid in his defense.

18. Criminal Law ⇐793

Trial court did not err in refusing to instruct jury with regard to consequences of acquittal by reason of insanity.

19. Rape ⇐57(1)

Although evidence was entirely circumstantial as to sexual assault charge, such evidence was sufficient to make out prima facie case with respect to first-degree sexual assault.

20. Criminal Law ⇐1206(2)
Homicide ⇐354

Imposition of death sentence following defendant's convictions on two counts of murder in the first degree was not excessive or disproportionate to death penalties imposed in other death penalty cases.

Syllabus by the Court

1. **Criminal Law: Trial: Evidence.** Evidence which tends to show a course of conduct, scheme, or design is admissible to prove identity, although such evidence relates to other offenses.

2. **Criminal Law: Trial: Evidence: Intent.** Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

3. Criminal Law: Trial: Evidence. Evidence of other criminal acts which involve or explain the circumstances of the crime charged, or are integral parts of an overall occurrence or transaction, may be admissible.

4. Criminal Law: Trial: Evidence: Homicide. If a photograph illustrates or makes clear some controverted issue in a homicide case, proper foundation having been laid, it may be received in evidence even if it is gruesome. The admission of photographs of a gruesome nature rests largely within the sound discretion of the trial court.

5. Criminal Law: Trial: Evidence: Homicide: Intent. In a homicide case, photographs of the victim, upon proper foundation, may be received in evidence for purposes of identification, to show the condition of the body, the nature and extent of the wounds and injuries, and to establish malice or intent.

6. Criminal Law: Venue: Judgments. A motion for a change of venue in a criminal case is addressed to the sound discretion of the trial court and its ruling will not be disturbed on appeal unless a clear abuse of discretion is shown.

7. Criminal Law: Trial: Evidence: Confessions. The admission in evidence of a statement or confession constitutes the trial court's independent determination that the statement was voluntarily made.

8. Criminal Law: Trial: Judgments: Confessions. A finding by the trial court that a statement of an accused is voluntary will not ordinarily be set aside on appeal unless the finding is clearly erroneous.

9. Criminal Law: Trial: Discovery. The mere possibility that an item of undisclosed information might have helped the defense or might have affected the outcome of the trial does not affect "materiality" in the constitutional sense.

10. Criminal Law: Trial: Discovery. In a criminal case the trial court is vested with broad discretion in considering discovery requests of defense counsel and error can be predicated only upon an abuse of such discretion.

11. Criminal Law: Juries: Instructions: Mental Health. It is not error to refuse to instruct a jury in a criminal case on the consequences of a verdict of not guilty by reason of insanity.

12. Criminal Law: Indictments and Informations: Evidence: Verdicts. It is only where there is a total failure of competent proof in a criminal case to support a material allegation in the information, or where the testimony adduced is of so weak or doubtful a character that a conviction based thereon could not be sustained, that the trial court will be justified in directing a verdict of not guilty.

13. Criminal Law: Statutes: Sentences: Words and Phrases: Death Penalty. In the context of Chapter 29, article 25, the word "sentence" in section 29-2521.03, R.S.Supp., 1978, is construed to mean a sentence of death, and the provisions of that section directing the determination by the Supreme Court of the propriety of a "sentence" by comparison with previous cases are applicable only in a case where a sentence of death has been imposed.

14. Criminal Law: Statutes: Supreme Court: Homicide: Time. Under L.B. 711, Laws of 1978, codified as part of Chapter 29, article 25, R.S.Supp., 1978, the Supreme Court will review and analyze only cases involving a conviction for first degree murder committed on or after April 20, 1973.

15. Criminal Law: Death Penalty: Supreme Court: Homicide. Where a death sentence has been imposed, and the Supreme Court is required to determine the propriety of that sentence in such case, the determination of which previous first degree murder cases involve the same or similar circumstances and are therefore comparable will be made by this court on a case-by-case basis.

Dennis R. Keefe, Lancaster County Public Defender, Thomas L. Hagel, and Richard L. Goos, Deputy Public Defenders, Lincoln, for appellant.

Paul L. Douglas, Atty. Gen., and Judy K. Hoffman, Asst. Atty. Gen., Lincoln, for appellee.

Heard before KRIVOSHA, C. J., BOSLAUGH, McCOWN, CLINTON, BRODKEY, and WHITE, JJ., and RIST, District Judge.

McCOWN, Justice.

Robert E. Williams pleaded not guilty by reason of insanity or mental derangement to two counts of murder in the first degree and one count of first degree sexual assault. He was found guilty by a jury on all three counts and sentenced to death on each of the two murder counts and to imprisonment for not less than 8½ years nor more than 25 years on the sexual assault count.

In the late afternoon of August 11, 1977, the bodies of Patricia A. McGarry and Catherine M. Brooks were found in the McGarry apartment in Lincoln, Nebraska, after a search was instituted when neighbors found the 5-year-old daughter of Catherine Brooks wandering in the neighborhood looking for her mother.

The naked body of Catherine Brooks was found lying face down in the center of the living room floor. A pool of blood surrounded her head. There was a nonfatal bullet wound in her back and two bullet wounds behind her left ear. Later medical examination revealed spermatozoa in the vagina and in the rectal tract. The pathologist testified that the spermatozoa would have had to be deposited within an hour of her death.

The body of Patricia McGarry was lying in the dining room, face up, clad in a blue housecoat. She had also been shot three times, once under her right ear and twice in the neck. There was a bloody trail on the carpet from the living room into the dining room to the spot where Patricia's body lay.

The police found an empty beer bottle with latent fingerprints on a chair. Later examination established the fingerprints as those of the defendant. The police also found a full box of .22 caliber long rifle shells on the coffee table in the living room and another unfired .22 caliber shell on the sofa. The casing of a .22 caliber shell was found on the floor of the living room. There was a bullet hole in the wall between the living and dining rooms, and a spent bullet was found in the entryway between the two rooms. Later investigation established that on August 10, 1977, at approximately 7:15 p. m., a model K-22 Smith & Wesson .22 caliber revolver and five boxes of .22 caliber long rifle shells were purchased by the defendant at a store in Lincoln.

Evidence at trial established that on August 11, 1977, at approximately 9:30 a. m., the defendant appeared at the apartment of another young woman in Lincoln, Nebraska. She had been acquainted with the defendant for approximately 6 months and he had been a babysitter for her 2-year-old daughter on occasion. The defendant told the woman that his car was broken down and asked to use her telephone. She admitted him and he then told her he needed to stay in her apartment for a while. She suggested that he stay in the storage room area of the apartment complex instead. The defendant then drew a revolver and demanded that she have sexual relations with him. She tried to lock herself in the bathroom but the defendant forced the door open and broke off the lock. He struck her in the chest and on the side of the head with the gun and threatened to blow her head off, and then raped her. The defendant remained in the apartment for several hours and raped the woman repeatedly.

At approximately 4 p. m., the defendant ordered the woman to bring her 2-year-old child and go to his car with him. As they approached the curb he told her she was free to go. She immediately went to a neighbor's home and called the police.

The woman testified that during the time the defendant had been with her, he drank one beer and smoked a joint of marijuana but appeared normal and did not appear to be intoxicated. Other witnesses who had been with the defendant on August 10, and one as late as 1:30 a. m., on August 11, 1977, testified that on those occasions the defend-

ant appeared normal in speech and actions and did not appear to be intoxicated, although he had been drinking.

The evidence at trial established that defendant left the woman's apartment in Lincoln about 4 p. m., August 11, 1977, and about an hour later was seen at a service station in Fremont, Nebraska, some 50 miles away, where he stopped and purchased gasoline. The station attendant testified that the defendant's speech and coordination appeared to be normal, although he smelled alcohol on the defendant's breath.

At approximately 10:15 p. m., on August 11, 1977, a deputy sheriff observed and checked the defendant's car at a park and rest area in Cherokee County, Iowa, and checked it periodically thereafter through the night. At 6:15 a. m., the deputy had the car towed away. Upon examination of the car, the deputies discovered a packaging box for a Smith & Wesson K–22 revolver; a box of .22 caliber long rifle cartridges from which six cartridges had been removed; a bag of marijuana; and some gas cans with negroid hairs on them.

Shortly after 6 a. m., on August 12, 1977, Mrs. Jack Montgomery, who lived 1½ miles west of the park and rest area in which defendant's car had been found, discovered that her car was missing from the garage. There was a blanket in the car and another blanket was also missing. She also found a checkbook with the name of the defendant imprinted on the checks lying in the driveway in front of the garage. At approximately 10 o'clock the same morning the Montgomery car was found abandoned in a ditch about 20 miles northeast of the Montgomery farm.

A little after 7 a. m., on the same morning, Elbert Bredvick was standing in his farmyard approximately 5 miles southwest of the point at which the Montgomery car had been abandoned. Bredvick observed the defendant approaching carrying two blankets draped over his shoulder. The defendant asked for directions to the nearest town. Bredvick gave the defendant directions which led defendant past the Wayne Rowe farmhouse one-half mile to the west, and the defendant departed in that direction.

On the morning of August 12, 1977, Mrs. Wayne Rowe left the farm home at 7:45 a. m., for an appointment at her hairdresser. Wayne Rowe left the house about 8:15 a. m., and returned shortly after noon, expecting his wife to be home. He observed that his wife's car was gone and when he entered the house he saw his wife's purse on the chair and the morning mail on the table. About that time an Iowa state trooper arrived and Rowe and the trooper went upstairs and found Mrs. Rowe's naked body on the bed. There was a shotgun wound in her side and another in her back, and there was a wound in her neck from a .22 caliber bullet. Later examination established that she had also been sexually assaulted.

Negroid hairs were found in her hand and on the bedspread which compared favorably in diameter, coloration, pigment distribution, scale patterns, and medullation to samples taken from the defendant and the hairs found on the gas cans in his car. A .22 caliber bullet was found in the fibers of the bedspread which matched the bullets recovered from the bodies of Catherine Brooks and Patricia McGarry. A shotgun which had been kept in the Rowe home was missing and the telephone line had been cut.

In the bushes behind the Rowe garage officers found the blankets which were identified by Bredvick as the blankets that had been draped over the defendant's shoulder earlier that morning. The Rowe car was found later in St. Paul, Minnesota. Inside the car was a live round of .22 caliber ammunition and a misfired cartridge with a firing pin impression which matched a casing found at the murder scene.

On August 13, 1977, at approximately 1:30 p. m., in a suburb of St. Paul, Minnesota, the defendant confronted Walter Behun at gunpoint in the Behun yard and ordered Behun to drive him to St. Paul. They drove around for some time, ending at a railroad freight yard, where the defendant tied Behun up with belts and a sweat shirt, gagged him, and left him in a caboose. Behun

testified that the defendant did not appear to be intoxicated.

About 3 p. m., on August 13, 1977, a young woman was returning to her car in a parking lot in St. Paul, Minnesota. She opened the car door and placed her purchase on the floor. The defendant came up behind her and ordered her to get into the car or he would shoot her. Before she had time to do so, he shot her once in the arm and again later behind her left ear. The defendant pushed her into the car, demanded the keys, and drove to a remote country area where he raped her. After the assault, the defendant tied her hands and legs and drove off in her car. She managed to untie herself, got to a farmhouse and was taken to the hospital, where she ultimately recovered.

The evidence indicates that after August 13, 1977, the defendant went to Chicago, Illinois, and then back to Lincoln, Nebraska, where he was arrested in the railroad yards on the early morning of August 18, 1977.

The defendant made a statement to the police which was admitted in evidence, and also testified at trial. Essentially, the defendant admitted shooting both Catherine Brooks and Patricia McGarry at the apartment in Lincoln, but denied raping Catherine Brooks. He testified that he was heavily under the influence of drugs and liquor at the time of the shootings and that his recollection was consequently very vague and confused.

On the issue of insanity raised by the defendant's plea, two psychiatrists testified for the prosecution, and both testified that although the defendant suffered from a personality disorder, he was not insane at the time of the murders and assault. Two psychiatrists for the defense testified that at the time of the crimes the defendant suffered from a paranoid state beyond that of a personality disorder. One testified that the defendant's perception of reality and his judgment were seriously impaired, but the doctor could not say the defendant did not know that what he was doing was wrong. The other doctor testified that the defendant's thinking process was distorted and that he would know his actions were wrong only if he took time to think. At the conclusion of the trial the jury found the defendant guilty on all three counts. A three-judge panel sentenced him to death on each of the two murder counts and to imprisonment for not less than 8½ years nor more than 25 years on the sexual assault count, and this appeal followed.

[1] The defendant contends that the trial court erred in admitting evidence of crimes other than those with which the defendant was charged, and that the evidence of such crimes was inadmissible and prejudicial. The defendant argues that none of the evidence of subsequent crimes was needed to prove any of the elements of the crimes charged, and that there is no legal connection between such subsequent crimes and the crimes with which the defendant was charged. He relies on the general rule that evidence of other crimes is not admissible to prove the defendant guilty of the particular crime with which he is charged. As an exception to that rule, this court has repeatedly held that evidence of other crimes similar to that charged is relevant and admissible when it tends to prove a particular criminal intent which is necessary to constitute the crime charged. *State v. Casados*, 188 Neb. 91, 195 N.W.2d 210. In sexual assault cases evidence which tends to show a course of conduct, scheme, or design is admissible to prove identity, although such evidence relates to other offenses. *State v. Walker*, 200 Neb. 273, 263 N.W.2d 454.

Section 27-404(2), R.R.S.1943, provides: "(2) Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." See *State v. Nielsen*, 203 Neb. 847, 280 N.W.2d 904.

[2, 3] Evidence of other crimes may be admitted in a criminal prosecution where the evidence is so related in time, place, and

circumstances to the offense or offenses charged as to have substantial probative value in determining the guilt of the accused. Evidence which is not sufficiently related is excluded on the ground that the probative value is outweighed by the risk of undue prejudice. The question of probative value depends upon many considerations, including proximity in point of time and place, the character of the evidence, and all the surrounding circumstances. See Annotation, 92 A.L.R.3d 545.

Sexual crimes have consistently been classified as a class of crimes in which evidence of other sexual crimes has been recognized as having independent relevancy. Recent cases recognize that the problem cannot generally be solved by virtue of a mechanical rule of relevancy but, instead, is one of balance. McCormick on Evidence (2d Ed.), s. 190, p. 447, at p. 453 states: "[T]he problem is not merely one of pigeonholing, but one of balancing, on the one side, the actual need for the other-crimes evidence in the light of the issues and the other evidence available to the prosecution, the convincingness of the evidence that the other crimes were committed and that the accused was the actor, and the strength or weakness of the other-crimes evidence in supporting the issue, and on the other, the degree to which the jury will probably be roused by the evidence to overmastering hostility."

The trial court noted that in this case the crimes charged must, of necessity, be proved by circumstantial evidence and inference because of the lack of an eyewitness or a complete detailed statement of the defendant. The trial court's ruling on the defendant's motion in limine to exclude evidence of other crimes specifically stated: "The issue of mental competency bearing on the intent of the defendant in committing the alleged crimes, the marked similarity of design and motive of the other crimes and the closeness of the time period make the admissibility of the other crimes strongly relevant and overcome the prejudice and accumulation of evidence which results therefrom.

"The court further finds that the evidence of the various stolen automobiles is necessary to trace the course the defendant followed between the alleged other crimes which in the court's judicial discretion are admissible."

[4] Evidence of other criminal acts which involve or explain the circumstances of the crime charged, or are integral parts of an overall occurrence or transaction, may be admissible. *State v. Nielsen, supra.* The evidence of other crimes in the case now before us constituted a continuous chain of evidence detailing the course of defendant's flight, and the patterned course of criminal conduct which was an integral part of it. The evidence of other crimes was relevant to prove motive, opportunity, and intent, and that relevance is greatly strengthened by the fact that all the other crimes occurred within a period of less than 72 hours after the crimes with which the defendant was charged. Not only was the evidence relevant on the issue of motive and intent, but it established plan, preparation, and a method of operation substantially similar, including the use of the same gun and the similar wounds in the neck and near the ear of the victims.

[5] There was no abuse of discretion on the part of the trial court in admitting the evidence of other crimes here. The prejudicial effect on the defendant of the admission of the evidence of other crimes is clearly outweighed by the relevance of that evidence to prove the crimes with which the defendant was charged.

The defendant next contends that the photographs taken at the McGarry apartment in Lincoln and the Rowe farm in Iowa should not have been admitted because they were inflammatory, gruesome, and prejudicial, and that whatever relevance they may have had was outweighed by their prejudicial effect. We disagree.

Of the 22 photographs taken in Lincoln at the scene of the crimes charged, the majority of them were exterior and interior scenes showing only inanimate objects, and the defendant did not object to their admission.

The defendant objected to the admission of seven photographs, only some of which might be said to be gruesome. Three of the photographs were of Catherine Brooks; one of the back of her head and showing a blood stain beneath it; the second was of her upper torso and back; and the third was a view of her entire body, partially obstructed by a chair. Two photographs of Patricia McGarry as found at the scene were admitted into evidence; one of the upper torso showing the blood-stained carpet and book beneath her head; and the other of her entire clothed body. Two post mortem photographs of her, one a right view and the other a left view, were also admitted to show the location of wounds. Some cumulative photographs were not received into evidence and only three of the challenged seven photographs might reasonably be said to be gruesome.

The photographs of the Iowa crime scene are substantially similar in nature to those taken at the scene of the Nebraska crimes. The majority are exterior and interior scenes, showing only inanimate objects and are not gruesome. There were three photographs showing three different views of the victim's body. One showed the wound on her wrist, one showed the wounds on the left side of her head, and one showed the body as it was found, with the shotgun wound in the side. The three photographs showed the condition of the body and the nature and extent of the wounds. One additional photograph of the victim's body was excluded.

[6-8] The admission of photographs of a gruesome nature rests largely within the sound discretion of the trial court, which must determine their relevancy and weigh their probative value against their possible prejudicial effect. *State v. Freeman*, 201 Neb. 382, 267 N.W.2d 544. Although it is true that the probative value of gruesome photographs should be weighed against the possible prejudicial effect before they are admitted, if a photograph illustrates or makes clear some controverted issue in a homicide case, a proper foundation having been laid, it may be received, even if it is gruesome. *State v. Partee*, 199 Neb. 305, 258 N.W.2d 634. In a homicide case, photographs of the victim, upon proper foundation, may be received in evidence for purposes of identification, to show the condition of the body, the nature and extent of wounds or injuries, and to establish malice or intent. *State v. Dittrich*, 191 Neb. 475, 215 N.W.2d 637.

[9] The photographs admitted here were relevant and of direct probative value in establishing the various elements of the crimes charged. The court did not abuse its discretion in admitting the photographs into evidence.

The defendant next contends that the trial court erred in refusing to sustain a motion for a change of venue. The defendant contends that because of extensive publicity in the news media, virtually all the residents of Lancaster County had knowledge of the case, and many had formed opinions as to the guilt or innocence of the defendant. The defendant therefore argues that he could not receive a fair trial, nor could possible prejudice be cured by extensive voir dire examination.

The trial court held a hearing on the motion for change of venue prior to trial, at which time the results of an opinion survey conducted by two professional poll researchers and other evidence as to the nature and extent of pretrial publicity were introduced. The trial court reserved ruling on the motion pending the final selection of the jury. Extensive voir dire on jury selection extended over a period of 5 days, and the trial court then denied the defendant's motion for change of venue.

The record establishes that 11 of the 12 jurors recalled little about the publicity they had heard or read, and none had formed an opinion on the issue of the defendant's guilt. The twelfth juror at first indicated an opinion concerning some elements of the case, but also indicated confusion as to the voir dire questions and later responded that she did not have any opinion one way or the other. Upon questioning by the court she stated that she did not have a fixed opinion and that she could set aside

any impressions she may have gotten from publicity and decide the case fairly on the evidence given in the courtroom. All the jurors indicated that they believed they could be fair and impartial jurors.

The defendant takes the position that extensive pretrial exposure of jurors to information and news accounts as to the crimes with which the defendant was charged is sufficient, standing alone, to deprive him of due process. That conclusion is unfounded. *Murphy v. Florida*, 421 U.S. 794, 95 S.Ct. 2031, 44 L.Ed.2d 589.

[10] The burden of showing essential unfairness must be sustained by the one who claims such injustice and seeks to have the result set aside. As the United States Supreme Court stated in *Irvin v. Dowd*, 366 U.S. 717, 81 S.Ct. 1639, 6 L.Ed.2d 751: "To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court."

[11, 12] In this state a motion for a change of venue in a criminal case is addressed to the sound discretion of the trial court and its ruling will not be disturbed on appeal unless a clear abuse of discretion is shown. *State v. Klatt*, 187 Neb. 274, 188 N.W.2d [illegible]. While there was extensive pretrial publicity in the case now before us, we believe the record supports the action of the trial court in denying the motion for a change of venue and there was no abuse of discretion.

Defendant next contends that the trial court erred in failing to sustain defendant's motion to suppress all statements, admissions, and comments obtained from the defendant by law enforcement officers. Essentially the argument centers upon the fact that the *Miranda* rights were not included on the tape recording of the defendant's statement, and the defendant testified that the *Miranda* rights were never read to him, and that he requested the presence of his attorney.

Two police officers specifically testified that the *Miranda* rights were read to the defendant prior to the statement, that he responded affirmatively to each of them, and that the defendant did not request a lawyer and consented to give the statement at that time. The defendant's argument is that because the giving of the *Miranda* rights was not included on the tape recording, the absence from the recording is conclusive evidence that the rights were not given. Two police officers not only testified affirmatively that the *Miranda* rights were given, but explained why the tape recorder had not been turned on at the outset of the interrogation.

[13–15] In this state the admission in evidence of a statement or confession constitutes the trial court's independent determination that the statement was voluntarily made. See *State v. Davis*, 180 Neb. 830, 146 N.W.2d 220, cert. den., 386 U.S. 998, 87 S.Ct. 1320, 18 L.Ed.2d 348. A finding by the trial court that a statement of an accused is voluntary will not ordinarily be set aside on appeal unless the finding is clearly erroneous. *State v. Medina*, 189 Neb. 765, 204 N.W.2d 785. The trial court's finding of voluntariness is supported by the record and is not erroneous.

The defendant asserts that he was denied a fair trial and due process of law because of the State's prejudicial misconduct in withholding evidence favorable to the defendant in direct violation of the trial court's order concerning discovery and disclosure. In response to defendant's pretrial motions for disclosure and discovery, the trial court ordered the State to provide to the defendant for inspection and copying or photographing: (1) The defendant's statement; (2) the defendant's prior criminal record, if any; (3) the names and addresses of all witnesses on whose evidence the charge is based, including any witnesses which the prosecution intends to use in rebuttal; (4) the results and reports of physical and mental examinations, and of scientific tests or experiments made in connec-

tion with this particular case; and (5) documents, papers, books, accounts, letters, photographs, objects, or other tangible things of whatsoever kind or nature which could be used as evidence by the State.

[16] Defendant complains of violations which involve documents under paragraph 5 of the order and center around 18 police investigative reports which contained, in many instances, summaries of statements of witnesses as well as inferences or conclusions of officers as to the validity and veracity of portions or all of the witnesses' statements. The defendant asserts that if the testimony of a witness at trial differed in any respect from the statement as reported in the police report, the State should have delivered the police report to the defendant prior to trial. Such a conclusion is wholly unwarranted. At the hearing on defendant's motion for new trial, the alleged violation of the discovery order was raised and evidence introduced, and the trial court, on this issue, specifically found: "Nothing in the exhibits appears to be materially at odds with the testimony given at the trial. Those who testified were subjected to cross-examination at length by defendant's counsel or were called as witnesses for the defendant. No showing is made that information in the police reports could have been used to impeach any witness." The record fully supports that conclusion, and also establishes without serious question that the information in the police reports was not exculpatory or a mitigation of the degree of the offenses which would have been required to have been disclosed by the prosecution.

[17] The defendant's position is that if a defendant has made a general motion for discovery and disclosure which has been granted in the sense that it covers documents of whatsoever kind or nature which could be used as evidence by the State, the State is required to produce for the defendant anything which might aid in his defense. We can find no support for such a contention. In *Moore v. Illinois*, 408 U.S. 786, 92 S.Ct. 2562, 33 L.Ed.2d 706, the United States Supreme Court said: "We know of no constitutional requirement that the prosecution make a complete and detailed accounting to the defense of all police investigatory work on a case." In a similar vein, this court said: "We have not yet reached the point in this state where the county attorney is required to give his entire work product to the defense." *State v. Williams*, 183 Neb. 257, 159 N.W.2d 549.

In *United States v. Agurs*, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342, the United States Supreme Court said: "The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense."

In *State v. Isley*, 195 Neb. 539, 239 N.W.2d 262, this court said: "In a criminal case, the trial court is vested with broad discretion in considering discovery requests of defense counsel and error can be predicated only upon an abuse of such discretion." There was no abuse of discretion here.

[18] The defendant assigns as error the trial court's refusal to instruct the jury with regard to the consequences of an acquittal by reason of insanity. The recent case of *State v. Reitenbaugh*, 204 Neb. 583, 284 N.W.2d 19, has determined the issue adversely to the defendant. In that case we held: "It is not error to refuse to instruct a jury in a criminal case of the consequences of a verdict of not guilty by reason of insanity."

Defendant also assigns as error the trial court's failure to dismiss or to direct a verdict in favor of the defendant as to the first degree sexual assault count. For almost a century it has been the rule in this state that: "It is only where there is a total failure of competent proof in a criminal case to support a material allegation in the information, or where the testimony adduced is of so weak or doubtful a character that a conviction based thereon could not be sustained, that the trial court will be justified in directing a verdict of not guilty." *State v. Webb*, 197 Neb. 662, 250 N.W.2d 625.

[19] While the evidence in this case may be entirely circumstantial as to the sexual assault charge, there can be no real doubt that it was more than sufficient to go to the jury, and the trial court did not err in overruling the motion for directed verdict.

Finally, the defendant contends that the sentence of death is excessive relative to the facts of the case under the applicable statutory considerations.

Following the introduction of evidence at a sentencing hearing, the three-judge panel specifically found that the following aggravating circumstances were present: (1) That defendant had been previously convicted of another crime involving the use of threat or violence to the person, and had a substantial history of serious assaultive criminal activity; (2) that the murder of Catherine M. Brooks was committed in an apparent effort to conceal the identity of the perpetrator of a crime, but that the murder of Patricia McGarry was not; (3) that both murders were especially heinous, atrocious, cruel, and manifested exceptional depravity by ordinary standards of morality and intelligence and totally without any regard fur human life; and (4) that at the time the murder was committed the defendant also committed another murder.

The sentencing panel found as the single mitigating circumstance that the defendant possesses an antisocial personality which, with his intoxication from the use of alcohol and drugs and emotional disturbance at the time he committed the murders, did, in some manner, diminish the defendant's capability to conform his conduct to the requirements of the law, but not to such an extent as to excuse him for the legal consequences of his conduct in the commission of the crimes.

The sentencing panel further found that the aggravating circumstances outweighed any mitigating circumstances. The panel then imposed the death penalty on each count of first degree murder.

The procedures of the sentencing panel complied fully with the statutory standards and specific procedures applicable to trial courts in cases of conviction for murder in the first degree. See Chap. 29, art. 25, R.R.S.1943, and R.S.Supp., 1978.

Chapter 29, article 25, includes the provisions contained in L.B. 711, Laws of 1978, now codified as section 29–2521.01 et seq., R.S.Supp., 1978, which apply primarily to the method of imposition of death sentences in the trial court and review of such sentences by the Supreme Court. The expressed purpose of L.B. 711 is to apply scrupulous standards of fairness to the imposition of the death penalty to insure that the death penalty should be applied uniformly and not arbitrarily.

Sections 29–2521.02 and 29–2521.03, R.S. Supp., 1978, provide that the Supreme Court shall, within a reasonable time after July 22, 1978, review and analyze all cases involving criminal homicide committed on or after April 20, 1973, and that the Supreme Court, upon appeal, shall determine the propriety of the sentence in each case involving a criminal homicide "by comparing such case with previous cases involving the same or similar circumstances. No sentence imposed shall be greater than those imposed in other cases with the same or similar circumstances." In the context of chapter 29, article 25, the word "sentence" in section 29–2521.03, R.S.Supp., 1978, is construed to mean a sentence of death, and the provisions of that section directing the determination by the Supreme Court of the propriety of a "sentence" by comparison with previous cases are applicable only in a case where a sentence of death has been imposed.

A primary foundation, basic to the review of the statutory provisions referred to, is the fact that in this state first degree murder is the only crime for which the penalty of death can be imposed. The provisions of Chapter 29, article 25, dealing with sentencing, apply only to a conviction for first degree murder under section 28–303, R.S. Supp., 1978. See §§ 29–2519 and 29–2520, R.S.Supp., 1978. The Nebraska act, L.B. 711, Laws of 1978, was patterned after the Georgia act which requires the Georgia Supreme Court to review death sentences and determine: "Whether the sentence of death is excessive or disproportionate to the pen-

alty imposed in similar cases, considering both the crime and the defendant." § 27-2537, Georgia Code. That identical language appears in section 29-2522(3), R.S. Supp., 1978, which applies primarily to initial sentencing in the trial court. The Georgia Supreme Court has restricted its review and comparison of "similar" cases to cases involving crimes for which the death penalty is permissible. It should be noted also that in Georgia the death penalty is permissible for more than one specific crime. The review and comparison by the court has been restricted to cases involving the identical crime—felony murder against felony murder, rape against rape. *Coley v. State*, 231 Ga. 829, 204 S.E.2d 612. The Georgia cases reflect the obvious fact that it is a practical impossibility to make any meaningful comparison of a death sentence in a first degree murder case with any sentence imposed for another crime for which the death sentence is not authorized.

There is language in at least two sections of L.B. 711, Laws of 1978, directing the Supreme Court to review and analyze "all criminal homicides." If the language be interpreted to extend beyond first degree murder convictions, problems relating to the exercise of prosecutorial discretion in homicide cases and the exercise by juries of the decisional power of determining guilt or innocence or fixing degrees of culpability in homicide cases are all involved. To interpret that language of L.B. 711 literally would create insurmountable constitutional problems. In view of the disposition made here, it is unnecessary to discuss constitutional issues.

For all these reasons L.B. 711, Laws of 1978, codified as part of Chapter 29, article 25, R.S.Supp., 1978, will be construed to require the Supreme Court to review and analyze only cases involving a conviction for first degree murder committed on or after April 20, 1973. Where a death sentence has been imposed, and this court is required to determine the propriety of that sentence in such case, the determination of which previous first degree murder cases involve the same or similar circumstances and are therefore comparable will be made by this court on a case-by-case basis.

Our review and analysis includes first degree murder convictions for offenses committed on or after April 20, 1973, including cases presently pending in this court on appeal. Thirty-two cases are included in that review in addition to the case now before us. Twenty-one cases have been before this court previously on appeal. Eight cases were not appealed. Three additional cases are now pending in this court on direct appeal. Seven death sentences are now pending including the case now before us. The remaining twenty-five cases involve life sentences. The cases reviewed and analyzed are set out in the addendum to this opinion.

Analysis of all these cases indicates that a callous, coldblooded, and cruel disregard for human life, coupled with convictions for previous crimes involving violence to the person, has tended to be given great balancing weight as aggravating circumstances, and that extreme youth, coupled with the absence of any substantial record of previous criminal conduct, has tended to be given great balancing weight as mitigating circumstances. In all the death penalty cases previously affirmed or now pending in this court, each has involved at least three separate and distinct statutory aggravating factors and only one or no statutory mitigating factors. The case now before us also fits that pattern, and, in addition, is the only death sentence case now pending which involves multiple first degree murders.

[20] It would be virtually impossible to find two murder cases which are the same in all respects. We find no case in which a life sentence was given which involves the same or similar circumstances to that of the case at bar. Any objective weighing and balancing of aggravating and mitigating circumstances and comparison to the other death penalty cases now pending establishes that the death sentence in the case now before us is not excessive or disproportion-

ate to the death penalties imposed in the other death penalty cases. If sufficient aggravating circumstances existed in those cases to justify the imposition of the death penalty, then the merciless, callous murder of two defenseless women in this case provided ample justification for the death penalty here.

The defendant's remaining assignments of error are without merit, and the convictions and sentences are affirmed.

AFFIRMED.

ADDENDUM

First degree murder cases analyzed and reviewed as of November 1, 1979.

CASES APPEALED AND REPORTED

State v. Casper, 192 Neb. 120, 219 N.W.2d 226.
State v. Wilson, 192 Neb. 435, 222 N.W.2d 128.
State v. Nokes, 192 Neb. 844, 224 N.W.2d 776.
State v. Russell, 194 Neb. 64, 230 N.W.2d 196.
State v. Harris, 194 Neb. 74, 230 N.W.2d 203.
State v. Lytle, 194 Neb. 353, 231 N.W.2d 681.
State v. Ell, 196 Neb. 800, 246 N.W.2d 594.
State v. Sims, 197 Neb. 1, 246 N.W.2d 645.
State v. Stewart, 197 Neb. 497, 250 N.W.2d 849.
* *State v. Rust*, 197 Neb. 528, 250 N.W.2d 867.
* *State v. Holtan*, 197 Neb. 544, 250 N.W.2d 876.
State v. Simants, 197 Neb. 549, 250 N.W.2d 881.
State v. Record, 198 Neb. 530, 253 N.W.2d 847.
* *State v. Peery*, 199 Neb. 656, 261 N.W.2d 95.
State v. Beans, 199 Neb. 807, 261 N.W.2d 749.
State v. Scott, 200 Neb. 265, 263 N.W.2d 659.
State v. Simpson, 200 Neb. 823, 265 N.W.2d 681.
State v. Prim, 201 Neb. 279, 267 N.W.2d 193.
State v. Fuller, 203 Neb. 233, 278 N.W.2d 756.
State v. Nielsen, 203 Neb. 847, 280 N.W.2d 904.
State v. Bennett, 204 Neb. 28, 281 N.W.2d 216.

CASES NOT APPEALED TO SUPREME COURT

State v. Jimmie Ray Anderson Sentence 7/26/73.	Dawson County—District Court Case No. 14391
State v. Kelvin Anderson Sentence 9/25/78.	Douglas County—District Court Doc. 102, p. 85
State v. Brown Sentence 3/25/74.	Douglas County—District Court Doc. 88, p. 625
State v. Floyd Sentence 5/16/78.	Hamilton County—District Court Doc. 24, p. 196
State v. Hatcher Sentence 4/14/78.	Douglas County—District Court Doc. 101, p. 321
State v. Marshall Sentence 3/13/78.	Lancaster County—District Court Doc. 48, p. 262
State v. Rowert Sentence 12/8/77.	Platte County—District Court Case No. 2805
State v. Schaeffer Sentence 9/30/77.	Hall County—District Court Doc. 28, p. 279.

* Death sentence pending.

CASES PENDING ON APPEAL IN SUPREME COURT
NOVEMBER 1, 1979.

*No. 42204—State v. Otey	Douglas County—District Court
Sentence 6/20/78	Doc. 101, p. 489
*No. 42301—State v. Anderson	Douglas County—District Court
Sentence 8/24/78	Doc. 99, p. 392
*No. 42302—State v. Hochstein	Douglas County—District Court
Sentence 8/24/78	Doc. 99, p. 394.

KRIVOSHA, Chief Justice, concurring in part and in part dissenting.

With all due respect to my brothers who make up the majority in this case, I must in part dissent from their decision in this case. I wholeheartedly concur in all the conclusions reached by the majority, including its analysis and interpretation of how we are to apply L.B. 711, Laws 1978, except as to its single conclusion that the death penalty should be imposed in this case. My review of those cases included in the majority's addendum compels me to reach a contrary conclusion. I would modify the judgment of the trial court by declaring that the defendant be sentenced to a term of life imprisonment rather than be sentenced to execution.

So that there be no confusion with regard to the matter, let me clearly and unequivocally state that my decision is not based upon any conviction that in no case should the death penalty be imposed. Quite to the contrary, I am of the mind that in an appropriate case under the law as it presently exists, the imposition of the death penalty would be both lawful and appropriate. It is just that I conclude in this case the law does not authorize the imposition of the death penalty.

I totally reject the contention made by some that the imposition of the death penalty is either immoral or unethical when imposed by a society pursuant to its criminal code and subject to the further requirement that the defendant be afforded due process of law. We find the imposition of capital punishment in an appropriate case provided for as early as the Mosaic Code and perhaps even before. I have difficulty concluding that that which is embodied in the Mosaic Code can be either unethical or immoral.

It is true that some societies, through the ages, have discriminated in the manner in which capital punishment has been administered or have imposed it in a barbaric manner. Neither of those actions can be condoned. But the mere fact that a society prescribes the imposition of the death penalty in an appropriate case does not cause it to be either immoral or unethical.

I, likewise, reject the contention made by some that the imposition of the death penalty serves as a deterrent to future crime. The evidence with regard to that matter is either totally lacking or, if available, is so inconclusive that it is not reliable. Except in rare instances, the crime itself for which the penalty is imposed is of such a nature that few, if any, give much thought to the ultimate consequences.

My rationale for recognizing the right of a society to impose capital punishment in an appropriate case is, rather, based upon a view that a civilized society has a right to assign to that crime or crimes, which it considers to be the most heinous, the most severe penalty it can inflict. That is to say, a society may declare in advance what crime or crimes it considers to be of the highest order and the worst offense to mankind by providing for a penalty which likewise is of the highest order and the most severe. In so doing, the society has clearly and unequivocally announced to its members that this crime for which the ultimate penalty is imposed is a crime separate and apart from all other crimes which can or may be committed within the society. It is an attempt by the people, through their legislative body, to issue a pronouncement with regard to the nature of the crime. It is on that basis that I find the Legislature

of this state may appropriately ascribe, as an alternative penalty for the commission of the most heinous crime (first degree murder), the imposition of the death penalty. It should therefore be clear then that my disagreement with the majority today is not based upon any notion that capital punishment is never appropriate.

My difficulty arises by reason of my analysis of the 32 cases reviewed by the majority in reaching its conclusion that the imposition of the death penalty in this case is appropriate. The majority notes that "in all the death penalty cases previously affirmed or now pending in this court, each has involved at least three separate and distinct statutory aggravating factors and only one or no statutory mitigating factors * * * any objective weighing and balancing of aggravating and mitigating circumstances and comparison to the other death penalty cases now pending, establishes that the death sentence in the case now before us is not excessive or disproportionate to the death penalties imposed in the other death penalty cases." With that statement I agree. But it is my belief that the fact that this case squares with the seven other cases in which the death penalty has been imposed does not answer the question. I am more concerned, as I believe L.B. 711, Laws 1978, requires me to be concerned, as to how this case squares with the remaining 25 cases where the death penalty was not imposed.

It was noted by this court in *State v. Stewart*, 197 Neb. 497, 250 N.W.2d 849, "Following the issuance of the opinion of the United States Supreme Court in *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), the Nebraska Legislature, in an effort to conform with the requirements for validity of death penalty statutes set forth in *Furman*, revised Nebraska's statute, and in 1973 enacted L.B. 268, R.R.S.1943, which now appears as sections 29-2519 to 29-2546, R.R.S.1943." L.B. 268, Laws 1973, prescribed a series of aggravating circumstances and mitigating circumstances which were to be considered by the trial court in determining whether to impose the death penalty. We early concluded that the fact that there was a list of aggravating circumstances and a list of mitigating circumstances did not mean that one was to simply add up the aggravating circumstances and add up the mitigating circumstances and subtract one from the other.

Again, in *State v. Stewart*, *supra*, we said, " 'It must be emphasized that the procedure to be followed by the trial judges and juries is not a mere counting process of X number of aggravating circumstances and Y number of mitigating circumstances, but rather a reasoned judgment as to what factual situations require the imposition of death and which can be satisfied by life imprisonment in light of the totality of the circumstances present. Review by this Court guarantees that the reasons present in one case will reach a similar result to that reached under similar circumstances in another case. No longer will one man die and another live on the basis of race, or a woman live and a man die on the basis of sex. If a defendant is sentenced to die, this Court can review that case in light of the other decisions and determine whether or not the punishment is too great.' "

We further went on in *State v. Stewart*, *supra*, to quote from the Florida decision of *Alvord v. Florida*, 322 So.2d 533 (Fla.1975): " 'There is no way that the Legislature could program a judicial computer with all of the possible aggravating factors and all of the possible mitigating factors in each case. See *State v. Dixon*, supra [283 So.2d 1 (Fla.)]. The law does not require that capital punishment be imposed in every conviction in which a particular state of facts occur. The statute properly allows some discretion, but requires that this discretion be reasonable and controlled. No defendant can be sentenced to capital punishment unless the aggravating factors outweigh the mitigating factors. However, this does not mean that in every instance under a set state of facts the defendant must suffer capital punishment.' " It therefore seems quite clear from what we have heretofore said that while L.B. 268, Laws 1973, prescribed aggravating and mitigating circum-

stances, they were intended to serve as a guide and not as an absolute. Some latitude was still left with the courts as to when the death penalty was to be imposed. Were nothing more involved in this case than L.B. 268, Laws 1973, I might be able to agree with the majority. I must, however, continue my analysis of this case in light of the fact that after adopting L.B. 268, Laws 1973, our Legislature saw fit to adopt L.B. 711, Laws 1978. I must, therefore, presume that the Legislature intended L.B. 711, Laws 1978, to serve as either an addition to or a modification of L.B. 268, Laws 1973. Otherwise, there would have been little purpose or sense in adopting that second act. I believe that a reading of L.B. 711, Laws 1978, discloses that the Legislature intended to add to L.B. 268, Laws 1973.

Under the provisions of L.B. 711, Laws 1978, we are now not only required, before imposing the death sentence, to consider aggravating and mitigating circumstances but we are further required, under the provisions of section 29-2521.03, R.S.Supp., 1978, to "determine the propriety of the sentence in each case involving a criminal homicide by comparing such case with previous cases involving the same or similar circumstances. No sentence imposed shall be greater than those imposed in other cases with the same or similar circumstances." What constitutes a "circumstance" is not spelled out. Likewise, L.B. 711, Laws 1978, imposes on the trial court in the first instance, and this court on appeal, a duty before ordering the death penalty to consider (1) whether sufficient aggravating circumstances exist to justify imposition of a sentence of death, (2) whether sufficient mitigating circumstances exist which approach or exceed the weight given to the aggravating circumstances, or (3) whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. Subsection (3) was added to L.B. 268, Laws 1973, by L.B. 711, Laws 1978. The Supreme Court is authorized to reduce any sentence it finds not to be consistent with sections 29-2521.01 to 29-2521.04, 29-2522, and 29-2524, R.S.Supp., 1978. All of that makes it seem clear to me that not only is this court required to examine aggravating and mitigating circumstances, but in addition to that we are supposed to in some manner place each first degree murder case one on top of the other to see whether or not they all conform. While I may be the first to concede that imposing such a duty upon the court is at best difficult and perhaps impossible, nevertheless, I cannot find how I can ignore that requirement. I do not by saying this suggest that the majority has ignored that requirement. They have reached a different conclusion by reason of making a significant distinction in the circumstances. For me, however, once the act of intentionally killing another is established, I find the other circumstances to be of less significance and therefore the distinctions much more difficult to make. It is in this area where I differ with the majority. It is simply a fact that when I place the cases one on top of the other, I do not reach the same conclusion as reached by the majority. For me, factors such as the age of the defendant or the previous record of the defendant are not nearly as significant as the circumstances under which the murder was committed.

Of the remaining 25 cases where life sentences have been imposed in lieu of death, I find the following to be true. In *State v. Nokes*, 192 Neb. 844, 224 N.W.2d 776, the defendant pleaded guilty to one count of first degree murder for the killing of Wilma Hoyt and one count of second degree murder for the killing of Edwin Hoyt. The facts disclosed that the defendant shot and killed the couple, dismembered their bodies with a butcher knife, wrapped the pieces, and placed them in a freezer. Later the frozen pieces were removed from the freezer and thrown into a lake. The defendant was given a life sentence.

In *State v. Sims*, 197 Neb. 1, 246 N.W.2d 645, the defendant was convicted of first degree murder. The facts disclose that prior to the shooting the deceased had been driving his automobile. The defendant and the deceased were involved in a near accident which resulted in the defendant hav-

ing words with the deceased. After a brief conversation the defendant returned to his automobile. A short time later the defendant returned to the area where the deceased was parked. A passenger in the defendant's automobile stepped out of the car and fired a pistol in the air. The defendant removed a shotgun from the car and walked rapidly in the direction of the deceased who was standing against his car. The defendant stopped when he was about 10 feet away from the deceased and fired one shell which struck the deceased in the abdomen, causing his death. The defendant was sentenced to life imprisonment.

In *State v. Stewart*, 197 Neb. 497, 250 N.W.2d 849, the evidence discloses that the defendant, though only 16 years of age, was engaged in the business of selling marijuana. He induced his suppliers to meet him so that he could "rip them off." The defendant, without provocation, shot the two dealers, hitting them in the back of the head, fatally shooting one who died instantaneously and wounding the other. The wounded one fell to the floor of the van and observed the defendant spreading gas in the van and igniting it in an effort to conceal the crime. The defendant was sentenced to life imprisonment.

In *State v. Record*, 198 Neb. 530, 253 N.W.2d 847, the defendant and another were driving in an automobile when they decided to rob anyone who next came along. They drove to approximately 180th and Dodge Streets in Omaha and parked on a side road waiting for someone to drive by so that the defendant could shoot and rob someone. Approximately 3 a. m., a car driven by the victim passed their parked car, proceeding east on Dodge Street. With one of the parties driving, the victim's car was pursued. As the car drove alongside it as if to pass, the defendant fired a shot, breaking the glass and killing the driver. The defendant was sentenced to life imprisonment.

In *State v. Scott*, 200 Neb. 265, 263 N.W.2d 659, the defendant was charged with murder in the perpetration of or an attempt to perpetrate a robbery. The evidence discloses that the defendant entered the home of William and Bertha McCormic in Omaha and demanded money at gunpoint. A scuffle ensued and Mr. McCormic was shot twice and killed, and Mrs. McCormic was shot twice and wounded. Mr. McCormic was 92 years of age at the time. Mrs. McCormic, age 83, had impaired vision and could not describe her assailant with any specificity. The defendant was sentenced to life imprisonment.

In *State v. Prim*, 201 Neb. 279, 267 N.W.2d 193, the defendant was charged with first degree murder, having shot and killed the defenseless operator of a gas station during the commission of a robbery. He was sentenced to life imprisonment.

Likewise, there are eight additional cases included in the addendum in which a life sentence was imposed for first degree murder and not appealed to this court. In *State v. Anderson* the defendant, though admittedly only 15 years old, had three previous felonies. During the course of a robbery committed by jumping into the victim's automobile, the defendant shot the victim in the head. He was sentenced to life imprisonment.

In *State v. Hatcher* the defendant, being pursued by a police officer, engaged in a struggle with the police officer, and as the officer struggled with the defendant the officer's gun went off twice, the second time hitting the officer in the head. The defendant was sentenced to life imprisonment.

In *State v. Brown* the defendant killed his victim during a robbery. He was sentenced to life imprisonment.

In *State v. Jimmie Ray Anderson*, the 34-year-old defendant and his wife resisted arrest by a patrolman and in the struggle in the police car the patrolman was shot and killed. The defendant was sentenced to life imprisonment.

In *State v. Schaeffer*, the defendant, a 16-year-old, together with a friend, forced the owner of the Ace Hardware Store in Grand Island into their car at gunpoint where, after robbing him, they shot him 17

times. The defendant was sentenced to life imprisonment.

In *State v. Floyd*, the defendant, 37 years old, shot and killed an unarmed gas station attendant during the course of a robbery. He was sentenced to life imprisonment.

In *State v. Rowert*, the 23-year-old defendant who had been drinking robbed another who also was intoxicated and who had a substantial sum of money on his person. The defendant determined to kill the victim so that the defendant could not be identified. The defendant lured the victim out of a bar and drove him out into the country where he took the money and then slit the defendant's throat and then decapitated him. He was sentenced to life imprisonment.

In *State v. Marshall* the defendant, a 20-year-old working in a flower shop in Lincoln, robbed the owner and in the course of the robbery struck the owner in the head several times with a metal bar from which the victim died. He was sentenced to life imprisonment.

In each of the cases I have referred to where a life sentence has been imposed, one can find distinguishing factors, to be sure, and in that regard I cannot quarrel with the majority in its conclusion. I'm simply unable to make such fine distinctions with regard to, on the one hand, the matter of killing and, on the other hand, the imposition of the death penalty. I have difficulty seeing how the killing of a defenseless, faceless victim driving an automobile is any less heinous than the case at bar. Once the facts establish the totally unnecessary, meaningless, and wasteful but deliberate, intentional killing of another, I have difficulty significantly distinguishing the circumstances under which the crime was committed. It is my view that the Legislature, in adopting L.B. 711, Laws 1978, must have intended to further restrict the imposition of the death penalty as previously provided for in L.B. 268, Laws 1973, by directing us not to impose the death penalty if on previous occasions of cruel and senseless killings we have not imposed the death penalty.

My conclusions herein legitimately pose two questions: (1) If the death penalty is not appropriate in this case, when will it be appropriate, and (2) has the adoption of L.B. 711, Laws 1978, placed us into such a mold that we may no longer impose the death penalty under any circumstances where a single person has been given a life sentence under similar circumstances. With regard to the first question, let me simply say that I believe I will recognize an appropriate case when I see it. I have no doubt that given that appropriate case, based upon all the things we have done in cases heretofore, I will be able to conclude that the imposition of the death penalty is intended even in light of L.B. 268, Laws 1973, and L.B. 711, Laws 1978, and I will be able to affirm the imposition of that penalty. Unfortunately, I cannot in advance articulate how or under what circumstances that may be.

With regard to the second question, whether we are now in such a mold from which it may be difficult, if not impossible, to get out, I can simply say that that is a matter which must appropriately be considered by the Legislature. Too often, courts are accused of intruding into the legislative arena. I choose not to do so. I believe the Legislature intended to limit situations in which the death penalty is imposed. If, in fact, the passage of L.B. 711, Laws 1978, has made the imposition of the death penalty difficult, if not impossible, then it is for the Legislature to reconsider its action.

Nothing I have said here should in any manner be misconstrued so as to permit one to conclude that I do not consider the commission of murder a heinous, appalling, and virtually unforgiving crime. Indeed I do. I hold no belief that one who commits such a crime is entitled to anything other than the most severe punishment. I am, however, constrained in my actions as a judge. On the one hand, I am obligated to impose a penalty required by law even in those instances where I may personally disagree. By the same token, I must likewise refrain from imposing a penalty where restrained

by the law, even in those cases in which I may personally disagree. That is the situation in which I find myself in this case. The murder in this case was a terrible, horrible, unforgiving crime. Yet it is likewise, in my mind, no worse (if such comparison with regard to murder can be made) than the senseless and meaningless taking of lives for which we have heretofore imposed life sentences. It is for that reason that I would disagree with the majority in that one limited area, and I would modify the judgment herein to provide that the defendant should be confined in the Nebraska Penal and Correctional Complex for the remainder of his natural life.

205 Neb. 90

STATE of Nebraska, Appellee,

v.

Harold Lamont OTEY, Appellant.

No. 42204.

Supreme Court of Nebraska.

Dec. 18, 1979.

Defendant was convicted before the District Court, Douglas County, John T. Grant, J., of first-degree murder in perpetration of sexual assault in first degree and was sentenced to death, and he appealed. The Supreme Court, Boslaugh, J., held that: (1) refusal to grant continuance on grounds that additional time was required to prepare for trial because defendant was undergoing psychiatric examination and because counsel was attempting to find evidence for a possible alibi defense was not abuse of discretion; (2) refusal to grant continuance on basis of State's late endorsement of names of additional witnesses was not abuse of discretion; (3) fact that juror stated that he could not be fair and impartial because defendant, if convicted, might be sentenced to death and that juror was excused and an alternate was seated after trial court ascertained that juror could not be fair and impartial did not warrant mistrial on theory that the jury selection was tainted; (4) evidence relating to defendant's assault on another woman subsequent to the charged offense was admissible; (5) determination whether defendant was a sexual sociopath was of no importance where death sentence was imposed; and (6) imposition of death sentence was not error or an abuse of discretion and such sentence was not excessive or disproportionate to penalty imposed in similar cases, considering both the crime and defendant.

Judgment affirmed.

Krivosha, C. J., concurred in part and dissented in part and filed opinion.

1. Criminal Law ⇐586, 1151

Motion for continuance is addressed to sound discretion of trial court, and order denying continuance will not be disturbed absent showing of clear abuse of discretion.

2. Criminal Law ⇐594(3), 595(10)

Where purpose of continuance is to obtain testimony of witnesses who are absent from the jurisdiction, a showing should be made that witnesses can be located, that they will testify and that their testimony would be relevant.

3. Criminal Law ⇐590(1)

In proceeding in which defendant was convicted of first-degree murder in perpetration of sexual assault in first degree, refusal to grant continuance on grounds that additional time was required to prepare for trial because defendant was undergoing psychiatric examination and because counsel was attempting to find evidence for a possible alibi defense was not abuse of discretion, in light of fact that no alibi evidence was produced and no issue was raised concerning mental responsibility of defendant, that the information had been on file for more than 60 days and that there was no basis on which to conclude that defendant did not have reasonable time in

Appendix D

IN THE SUPREME COURT OF THE STATE OF NEBRASKA

STATE OF NEBRASKA, Appellee, v. ROBERT E. WILLIAMS, Appellant.	)	No. 42235 ORDER

This Court having on the 18th day of December, 1979, affirmed the conviction and sentence of death imposed upon the defendant, Robert E. Williams, by the District Court for Lancaster County on the 30th day of June, 1978, for the crime of murder in the first degree, and having on the 14th day of February, 1980, overruled the motion for rehearing herein; it is ordered that the execution of said sentence be carried out on the 20th day of May, 1980, between the hours of 12:01 a.m. and 11:59 p.m. on said day in the manner provided by section 29-2532, R. R. S. 1943. It is further ordered that the Clerk of this Court, pursuant to the provisions of section 29-2545, R. R. S. 1943, issue his warrant, under the seal of this Court, to the Warden of the Nebraska Penal and Correctional Complex, directing the execution of the sentence at the time provided in this order and in the manner provided by statute.

Dated this 14 day of February, 1980.

THE SUPREME COURT OF NEBRASKA

By Norman Krivosha
Chief Justice, for the Court

SUPREME COURT OF NEBRASKA
FILED
FEB 14 1980
LARRY D. DONELSON,
Clerk

IN THE SUPREME COURT OF THE STATE OF NEBRASKA

STATE OF NEBRASKA, Appellee, v. ROBERT E. WILLIAMS, Appellant.	)	No. 42235 WARRANT

TO: THE WARDEN OF THE NEBRASKA PENAL AND CORRECTIONAL COMPLEX, LINCOLN, NEBRASKA,

THE STATE OF NEBRASKA,

WHEREAS, on June 30, 1978, Robert E. Williams, the above-named defendant, was convicted of murder in the first degree by the District Court for Lancaster County, Nebraska, and

WHEREAS, on June 30, 1978, said Court sentenced said defendant to suffer death by electrocution upon said count on Wednesday, November 15, 1978, at 12:05 a.m., and

WHEREAS, on December 18, 1979, the Supreme Court of Nebraska affirmed the judgment of conviction and sentence.

NOW, THEREFORE, YOU ARE HEREBY COMMANDED to proceed on Tuesday, May 20, 1980, between the hours of 12:01 a.m. and 11:59 p.m. to carry said sentence of death by electrocution into execution by causing the passage of an electric current through the body of Robert E. Williams until dead, as provided by law.

YOU SHALL make return hereof of the manner of your execution of this warrant and of your doings thereon to the Clerk of the District Court of Lancaster County, Nebraska.

DATED this 14TH day of February, 1980.

Larry D. Donelson
Clerk of the Supreme Court

SUPREME COURT OF NEBRASKA
FILED
FEB 14 1980
LARRY D. DONELSON,
Clerk

Appendix C

STATE OF NEBRASKA,
APPELLEE

V.

ROBERT E. WILLIAMS
APPELLANT

NO. 42235

ORDER

Motion of appellant to stay issuance of mandate and execution of sentence sustained; mandate and execution of sentence stayed pending application to the United States Supreme Court

March 4, 1980

80-5113

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. _____

ROBERT E. WILLIAMS,

Petitioner,

v.

THE STATE OF NEBRASKA,

Respondent.

MOTION TO PROCEED IN FORMA PAUPERIS AND AFFIDAVIT

The Petitioner, Robert E. Williams, by his undersigned counsel, asks leave to file a Petition for Writ of Certiorari to the Supreme Court of Nebraska without prepayment of costs and to proceed in forma pauperis pursuant to Rule 53. Petitioner's Affidavit in Support of his Motion to Proceed in Forma Pauperis is attached.

ROBERT E. WILLIAMS, Petitioner

By _____

Thomas L. Hagel
Deputy Public Defender
555 South 10th Street
Lincoln, Nebraska 68508
Phone (402) 473-6631
Counsel for Petitioner

CERTIFICATE OF SERVICE

On this 13th day of May, 1980 the above was served on the attorney of record for all adverse parties by delivering a copy or copies thereof at their office address.

_____
Attorney of Record

80-5113

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

No._____

ROBERT E. WILLIAMS,

Petitioner,

v.

THE STATE OF NEBRASKA,

Respondent.

I, Robert E. Williams, being duly sworn, depose and say in support of my motion for leave to proceed without being required to prepay costs or fees and to proceed in forma pauperis:

1. I am the Petitioner in the above-entitled case.

2. Because of my poverty I am unable to pay the costs of said cause; I own no real or personal property; I am incarcerated and receive no income from earnings.

3. I am unable to give security for said cause.

4. Counsel is serving on my behalf without remuneration on my present appeal and was appointed to represent me at my trial and on my direct appeal.

5. I believe that I am entitled to the redress I seek in said cause.

6. The nature of said cause is briefly stated as follows: I was convicted in Lancaster County District Court, a trial court of the State of Nebraska, of two counts of Murder and First Degree Sexual Assault and was sentenced to be executed on November 15, 1978. I am being held under sentence of death at the Nebraska Penal and Correctional Complex. My appeal of my trial and sentence was upheld and affirmed by order of the Supreme Court of Nebraska on December 18, 1979, and a Motion for Rehearing was overruled by said Court on February 14, 1980. The Supreme Court of Nebraska is the highest appellate court of the State of Nebraska. I believe that errors were committed during the course of my trial in violation of my constitutional rights and that the death sentence was imposed upon me

in violation of my constitutional rights.

X Robert E. Williams
Robert E. Williams, Petitioner

STATE OF NEBRASKA)
) ss.
LANCASTER COUNTY)

The foregoing affidavit of Robert E. Williams was subscribed and sworn to before me this 13th day of May, 1980.

Thomas L. Hagel
Notary Public

My Commission expires: February 13, 1984.

GENERAL NOTARY SEAL
THOMAS
L. HAGEL
COMMISSION
EXPIRES
FEBRUARY 13
1984
STATE OF NEBRASKA

CERTIFICATE OF SERV.
On this 13th day of May, 1980
the above was served on the attorn
of record for all adverse parties b
delivering a copy or copies thereof at
their office address.

Thomas L. Hagel
Attorney of Record